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United States Court of Appeals

FOR THE THIRD CIRCUIT

DOCKET #12179

CHARLES GARDNER,
Libellant-Appellee,

against

"M/V CALVERT", her engines, machinery, tackle, fittings, equipment, etc., and ERNEST E. FUCHS and SOUND STEAMSHIP LINES, INC., and all other persons lawfully intervening for their interest,
Respondents-Appellants.

APPENDIX OF RESPONDENTS-APPELLANTS ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

MARCEL WAGNER,
Proctor for Respondents,
921 Bergen Avenue,
Jersey City, New Jersey.

CORYDON B. DUNHAM,
CURLEY C. HOFFPAUIR,
Advocates,
60 Broad Street,
New York 4, New York.

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Docket Entries

Civil 649-52

Date	Filings—Proceedings
7/10/52	Libel and Complaint, filed.
7/10/52	Monition and Citation issued returnable Aug. 26, 1952.
7/10/52	Stipulation for Libellant's costs, filed.
7/10/52	Notice of Allocation, filed (Newark).
7/28/52	Stipulation for Claimant's Costs filed.
7/28/52	Notice of Appearance of Ernest E. Fuchs, filed.
7/28/52	Notice of Appearance of Sound Steamship Lines, Inc., filed.
7/28/52	Claim of Owner of Sound Steamship Lines, Inc., filed.
7/28/52	Exceptions of Sound Steamship Lines, Inc., filed.
7/30/52	Monition and citation returned executed, filed 7/29/52.
7/31/52	Notice of motion to hear exceptions, and acknowledgment of service, filed (ret. 8/12/52).
8/13/52	Proof of Publication filed.
8/14/52	Hearing on exceptions. Decision Reserved. (Modarelli) (8/12/52).
8/15/52	Letter-Opinion filed, 8/14/52. (Modarelli).
9/ 5/52	Order for release of vessel and disallowing first exception, etc., filed 9/4/52. (Modarelli).

Docket Entries

Date	Filings—Proceedings
9/26/52	Answer of Sound Steamship Lines, Inc., filed 9/25/52.
9/26/52	Answer of Ernest E. Fuchs, filed 9/25/52.
10/17/52	Amended Notice to take Deposition of Ernest Fuchs, filed 10/16/52.
10/17/52	Answer to interrogatories, filed 10/16/52.
10/30/52	Order to show cause re vacating Amended Notice to Take Deposition of Respondents, ret. 11/10/52, filed (Meaney).
11/12/52	Hearing on application to vacate amended Notice to take deposition of respondents. Ordered application denied. (Meaney) (11/10/52).
11/12/52	Ordered application for an order for leave to examine libellant upon consent, granted. (Meaney) (11/10/52).
12/21/53	Notice of Motion for discovery and inspection returnable 12/21/53 and acknowledgment of service filed. (No brief submitted).
12/21/53	Affidavit in opposition to motion for discovery and inspection filed.
12/22/53	Ordered hearing on motion for discovery and inspection adjourned without date. (Meaney) (12/21/53).
12/22/53	Ordered pre-trial conferences adjourned without date (Meaney) (12/21/53).
11/ 5/54	Consent order for Discovery and Inspection, filed 11/4/54 (Meaney) Notice mailed.
2/10/55	Pre-Trial Conference. (Meaney) (2/8/55).

Docket Entries

Date	Filings—Proceedings
2/21/55	Transcript of pre-trial conference, filed.
4/ 2/56	Substitution of Attorney filed.
5/ 1/56	Trial without Jury before Hon. Thomas F. Meaney: (4/27/56) Trial adjourned to 5/1/56.
5/ 3/56	Trial continued: (5/1/56).
	Trial adjourned to 5/2/56.
5/ 4/56	Trial continued: (5/2/56).
	Trial adjourned to 5/3/56.
5/ 7/56	Trial continued: (5/3/56).
	Ordered the motion to strike testimony of witnesses, Charles Gardner, John M. Gardner and Helga Lynch, denied.
	Trial adjourned to 5/4/56.
5/ 8/56	Trial continued: (5/4/56).
	Ordered applications for leave to take deposition of Marty Gross by the respondents, and the deposition of Tice Towing Line by the Libellant, Granted.
	Counsel moved on behalf of respondents for a dismissal of action. Decision Reserved.
6/15/56	Stipulation and order extending time to file Briefs, filed 6/14/56. (Meaney).
6/19/56	Deposition of Joseph F. Carroll, Jr., filed 6/18/56.
10/ 4/56	Findings of Fact and Conclusions of Law, filed 10/3/56.

Docket Entries

Date	Filings—Proceedings
10/ 8/56	Amendment of Findings of Fact and Conclusions of Law filed 10/5/56 (Meaney).
10/11/56	Order denying motion for dismissal, heard 5/4/56, filed 10/10/56 (Meaney).
10/16/56	Libellant's notice of motion for entry of judgment returnable Nov. 13, 1956 and affidavit of service filed. (No brief submitted).
10/18/56	Respondent's notice of motion for reargument of motions for dismissal as to Ernest E. Fuchs and Sound Steamship Lines, Inc., returnable 11/13/56 and Affidavit of Mailing filed 10/17/56. (No brief submitted).
10/30/56	Notice of motion by Ernest E. Fuchs for reargument and reconsideration of opinion, findings of fact and conclusions of law; etc., affidavit and acknowledgment of service, filed 10/29/56 (ret. 11/13/56) (No brief submitted).
10/30/56	Notice of motion of Sound Steamship Lines for relief similar to that in motion of Ernest E. Fuchs, etc., affidavit and acknowledgments of service, filed 10/29/56 (ret. 11/13/56) (No brief submitted).
11/27/56	Hearing on motion by Ernest E. Fuchs for reargument and reconsideration of opinion, findings of fact and conclusions of law. Ordered motion denied. (Meaney) (11/26/56).
11/27/56	Hearing on respondent's motion for reargument of motions for dismissal as to Ernest E. Fuchs and Sound Steamship Lines, Inc., Ordered motion denied. (Meaney) (11/26/56).

Docket Entries

Date	Filings—Proceedings
11/27/56	Hearing on motion of Sound Steamship Lines for relief similar to that in motion of Ernest E. Fuchs, etc., Ordered motion denied. (Meaney) (11/26/56).
11/27/56	Hearing on libellants motion for entry of judgment. Judgment to be submitted. (Meaney) (11/26/56).
11/27/56	Transcript of testimony, filed 11/26/56 (Replaced by transcript filed 1/14/57).
12/ 6/56	Order for judgment for $50,885.00 with interest at the rate of four (4) per cent per annum from October 3, 1956, in favor of Charles Gardner, libellant and against the respondents, Ernest E. Fuchs and Sound Steamship Lines, Inc., with costs filed 12/5/56 (Meaney) Notice mailed.
12/11/56	Affidavit of Service of Copy of Order and Judgment filed 12/10/56.
12/12/56	Notice of Cross-Appeal, filed.
12/14/56	Notice of Appeal filed.
12/14/56	Supersedeas Bond filed.
1/10/57	Order denying motions heard 11/26/56, filed 1/9/57. (Meaney) Notice mailed.
1/10/57	Order extending time to file and docket record on appeal to 3/1/57; and extending time to forward record to 2/19/57, filed 1/9/57 (Meaney) (Copy forwarded to Clerk, USCA).
1/14/57	Transcript of trial in two volumes filed.
1/18/57	Order denying motion for re-trial and motion for dismissal of libel nunc pro tunc as of Nov. 29, 1956, filed.
2/18/57	Record on Appeal sent to U.S.C.A.

Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT

District of New Jersey

Civil Action No. 649-52

Charles Gardner

Libellant

vs.

M/V "Calvert", her engines, machinery, tackle, fittings, equipment, etc. and Ernest E. Fuchs and Sound Steamship Lines, Inc. and all other persons lawfully intervening for their interests

Respondents

Appearances:

Lasser & Lasser, Proctors for Libellant; Sidney M. Wittner, of counsel.

Marcel Wagner, Proctor for Respondents; Philip J. O'Brien, of counsel for Respondent Ernest E. Fuchs; Corydon B. Dunham, of counsel for Respondent Sound Steamship Lines, Inc.

Meaney, *District Judge.*

A libel was filed by Charles Gardner against the M/V "Calvert", her engines, etc., Ernest E. Fuchs and Sound Steamship Lines, Inc. The action is one for damages allegedly resulting from breach of charter and for the value of materials delivered to the vessel by the libellant. The M/V "Calvert" is a motor vessel registered in the State of New York. The respondent Ernest E. Fuchs is a citizen of the State of New York, and respondent Sound Steamship Lines, Inc. is a corporation incorporated under the laws of the State of Delaware.

Findings of Fact and Conclusion of Law

The libellant, Charles Gardner, with his brother and two others owned and operated a vessel, the "Sandy Hook", which ran from New York City to Atlantic Highlands, a point in New Jersey, mainly for the transport of passengers to and from the Monmouth Park Race Track at Oceanport, New Jersey. Sometime previous to July, 1951, title to the "Sandy Hook" was transferred to Sandy Hook, Inc. and subsequently the vessel sustained serious damage and was unable to operate. As a consequence a proceeding under Chapter 11 of the Bankruptcy Act was initiated and an order was made continuing the debtor in possession, and on July 31, 1951, the corporation was adjudicated a bankrupt and a trustee was appointed.

Before the adjudication it became apparent that the "Sandy Hook" would no longer be available for use, and libellant sought a substitute for transportation of devotees and amateurs of the "Sport of Kings" and fools, and determined that the M/V "Calvert", owned by Sound Steamship Lines, Inc., would be suitable for his purposes. The testimony in the case indicates that libellant investigated at least one other vessel, the "Dolphin" of Miami, Florida, which he found unseaworthy. Thereupon he decided to charter the only vessel which he thought was available, and about mid-June approached respondent Fuchs with reference to chartering the "Calvert." It would seem uncontroverted that discussions were had on the subject between the two parties, beginning about July 2, 1951. The nature of these discussions and the results arrived at are matters of sharp contradiction.

The libellant contends that in the course of several discussions Fuchs agreed to a charter of the "Calvert" every day of the week, including Sunday, during the racing season of 1951 which ran until August 8th, and thereafter to charters on a daily basis until Labour Day, the daily charters being for such excursion parties as libellant might book. He further asserts that Fuchs informed him he had

made extensive alterations to the "Calvert", including new engine, and that he was having her certified, but that some 830 life preservers were required before he could secure a required Coast Guard certificate; that other equipment, such as additional chairs, paint, a gangplank, etc., were needed, and that he, Fuchs, could not get the materials with sufficient dispatch. Libellant says that he thereupon offered to obtain them and place them on the "Calvert." These supplies he was to secure from the "Sandy Hook" with permission in open court of all interested parties, and from the M/V "Sunshine" owned by himself and his brother. Libellant further contends that Fuchs thereupon said he would charter the "Calvert" completely furnished for $400.00 a day, and that Gardner was to provide $75,000.00 Hull and Machinery Insurance and $250,000.00 P and I Insurance, and pay the crew and all operating expenses; the charter to begin as soon as Fuchs obtained the necessary Coast Guard certificate. The further testimony of respondent is to the effect that on July 5th the price and quantities of the furnishings and supplies above referred to were agreed upon and that they were to be delivered on Sunday, July 8th, when they were so delivered. Fuchs allegedly was present at the time of delivery and was given a list of the materials.

On July 5th libellant says that for the first time Fuchs demanded an advance on the hire of $5,000.00 and said he would like a performance bond for the protection of his new Diesel engine from possible damage by an incompetent engineer. Discussion, which involved representatives of the Race Track, resolved the question by reason of the alleged covering of such possible damage by the insurance on hull and machinery and by libellant's consent to the selection of an engineer by Fuchs, to be paid for by libellant.

On July 8th, in addition to supplying the materials above referred to, libellant put a crew aboard the "Calvert" and Fuchs was present when the crew arrived and started to

stencil the new lot of life preserves. At this time Fuchs presented libellant with a draft of a charter party, mentioning a performance bond, referring to a corporation instead of libellant, an individual, and containing blank and unfilled spaces. Libellant objected and Fuchs said he would redraw it to conform to their agreement.

Fuchs had requested a Coast Guard inspection for July 9th, but after this had begun it was halted by reason of a bent davit. On July 10th the inspection was to be completed and a boat drill held. The Coast Gurad inspector appeared, but no further inspection was made, nor was there any boat drill, though Fuchs and the crew were aboard.

That afternoon Gardner met Fuchs on board the "Calvert" with $5,000.00 advance on the hire and declared himself ready to proceed with the agreement made. At that time Fuchs demanded all of the charter money, and when this was not forthcoming told Gardner, among other things, that he was going to tie up the vessel and that he had already given an order for its removal to another berth at Perth Amboy, and in reply to a demand for payment for the material, refused and said that he (Gardner) could sue for it.

These contentions are partly substantiated by actual witnesses and insurance documents.

Respondent Fuchs denies most of the material assertions of the libellant, though confirming some details.

One of the questions made pertinent by Fuchs' contentions concerns the question of parol charter, and whether if made it must subsequently be reduced to writing. The authorities seem to be to the effect that a charter may be made by parol if the rights and duties are clearly set forth and agreed upon. Vide *American Hawaiian S. S. Co.* v. *Willfuehr*, 274 F. 214; *Salmons Dredging Corp.* v. *Herma*, 180 F.2d 233; *McGeeney* v. *Moran Towing Corp.*, 149 F.2d 791; also Benedict on Admiralty, 6th Edition, Vol. I, p. 273.

Findings of Fact and Conclusion of Law

FINDINGS OF FACT

1. In July, 1951, respondent Sound Steamship Lines, Inc. was the owner of the Motor Vessel "Calvert", and respondent Ernest E. Fuchs was president of said corporation.

2. Beginning on July 2, 1951, libellant negotiated with respondent Fuchs with a view toward chartering the "Calvert." A parol charter resulted. Charter was for the purpose of transporting passengers from New York City to Atlantic Highlands en route to the Monmouth Park Race Track at Oceanport, New Jersey, for Sunday trips to Atlantic Highlands, and for other stated purposes at the end of the racing season.

3. Libellant also delivered equipment to complete the outfitting of the "Calvert" to that ship on July 8, 1951, which respondent Fuchs took on board without protest, the evidence indicating to the court that the value of said equipment was $1,500.00.

4. On July 8, 1951, libellant put a crew aboard the "Calvert" without protest from respondent Fuchs.

5. On July 10, 1951, libellant appeared with $5,000.00 as an advance ready to proceed, but respondent Fuchs failed, neglected and refused to go through with the charter agreement.

6. Respondent Fuchs removed the vessel from its berth in New York to another in Perth Amboy, refusing to carry out the charter agreement.

7. The equipment delivered by libellant has remained aboard the "Calvert" and due demand for payment has been made.

8. No attempt to pay for the equipment or to go through with the parol charter agreement has been made by respondent Fuchs, though duly demanded by libellant.

Findings of Fact and Conclusion of Law

CONCLUSIONS OF LAW

1. This court has jurisdiction of the subject matter and the parties involved.

2. A parol charter existed by virtue of the arrangement agreed upon by the parties.

3. Respondent Fuchs accepted and agreed to pay for equipment furnished by libellant.

4. Libellant is entitled to a decree against respondents for loss of profits from breach of charter, in the sum of $49,285.00, and for the equipment delivered by libellant aboard the "Calvert", in the sum of $1,500.00, with interest from July 12, 1956, and costs of court.

The damages have been determined in accordance with the principles set down in *Interchemical Corp.* v. *Uncas Printing and Finishing Co.* (1956) 120 A.2d 880, 39 N. J. Super 318, which adopts the rule set forth in *Rynveld, et al* v. *Depuis* (1930) 39 F.2d 399, which latter case cites with approval a similar rule set forth in *Eastman Kodak Co.* v. *Southern Photo Material Co.* (1923) 295 F. 98, where the court said at p. 102:

> "Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate. The defendant, whose wrongful act creates the difficulty, is not entitled to complain that the amount of the damages cannot be accurately fixed."

Let an appropriate order be submitted.

Amendment of Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 649-52

[SAME TITLE]

APPEARANCES:

LASSER & LASSER, Proctors for Libellant; SIDNEY M. WITTNER, Of counsel.

MARCEL WAGNER, Proctor for Respondents; PHILIP J. O'BRIEN, Of counsel for Respondent Ernest E. Fuchs.

CORYDON B. DUNHAM, Of counsel for Respondent Sound Steamship Lines, Inc.

MEANEY, *District Judge.*

The opinion filed herein on October 3, 1956, is amended as follows:

"July 12, 1956" on line 3 from the top of page 7 should read "July 12, 1951."

Order and Judgment

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 649-52

[SAME TITLE]

Libellant, Charles Gardner, having filed a libel herein against the M/V "Calvert", her engines, etc., Ernest E. Fuchs and Sound Steamship Lines, Inc. for damage for breach of a charter agreement, and for the value of materials delivered to the vessel at the request of the said Ernest E. Fuchs and Sound Steamship Lines, Inc. and the said libel having been tried on April 27th, May 1st, 2nd, 3rd, 4th, 5th and 6th, 1956, and the parties having appeared by their proctors and counsel and having adduced their proofs and filed their briefs, and the Court, after due deliberation, having made its decision and filed its findings of fact and conclusions of law on October 3, 1956, and amendment thereto and Respondents' motions to dismiss Libellant's case having been denied, and Libellant having moved for judgment, it is

ORDERED, ADJUDGED AND DECREED that the Libellant, Charles Gardner, recover of Respondents Ernest E. Fuchs and Sound Steamship Lines, Inc. the sum of $50,885.00 with interest at the rate of four (4) per cent per annum from October 3, 1956, with costs.

Dated: Newark, N. J.
December 5, 1956

THOMAS F. MEANEY
U. S. D. J.

Order

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 649/52

[SAME TITLE]

Both respondents, ERNEST E. FUCHS and SOUND STEAMSHIP LINES, INC., having moved this Court by notice of motion dated October 15, 1956 returnable October 22, 1956 for a reargument of the motions made by respondents on May 4, 1956 for a dismissal of the case as against them,

And respondent Fuchs having moved this court by notice of motion dated October 29, 1956 returnable November 13, 1956 for a reargument of the findings of fact and conclusions of law and for a dismissal of the libel as against him and for other relief therein mentioned,

And a separate motion having been made by respondent Sound Steamship Lines, Inc. by notice of motion dated October 29, 1956 returnable November 13, 1956 for similar relief sought in the notice of motion of respondent Fuchs and for a dismissal of the libel as against it,

And said motions having come on to be heard on November 26, 1956, and Joseph Keane Esq. of Counsel for Respondents having appeared in support of said motions, and Sidney M. Wittner Esq. of Counsel for Libellant having appeared in opposition thereto, and the motions having been heard, and due deliberation having been had thereon, it is

ORDERED, that said motions be and the same hereby are denied.

Dated: Newark, New Jersey,
November 29th, 1956

THOMAS F. MEANEY
U.S.D.J.

File the above order as of date of Nov. 29th, 1956, on which date it was actually signed.

THOMAS F. MEANEY
U.S.D.J.
Jan. 18, 1957

Notice of Motion

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civ. No. 649-52

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that respondents will move before Honorable Thomas F. Meaney, District Judge, at the Courthouse, in the Post Office Building, Federal Square, Newark, New Jersey, on Monday, October 22nd, 1956, at 10:30 A.M., or as soon thereafter as counsel can be heard for an order of this Court permitting a reargument of the motions of the respondents made on May 4, 1956, for a dismissal of the case as to the respondent, Ernest E. Fuchs, on several grounds and particularly for the reason that respondent, Ernest E. Fuchs was the President of the respondent Sound Steamship Lines, Inc., and acted only in his representative

capacity as such during the negotiations or discussions with respect to the proposed chartering of the M/V "Calvert"; and permitting a reargument of said motion as to the respondent, Sound Steamship Lines, Inc., on the grounds that the testimony of libelant Gardner throughout the case is that throughout the negotiations he relied upon there being a written charter and not an oral charter, and on other grounds.

And at such hearing the respondents will ask for an exception to the Court's ruling of October 10, 1956, denying dismissal of the case and for such other and further relief as may be deemed just and proper in the premises.

PLEASE TAKE FURTHER NOTICE that at the hearing, by affidavit, reference will be made to the testimony in the case, wherein application is being made for judgment.

Dated, New York, October 15, 1956.

Yours, etc.,

MARCEL WAGNER,
Proctor for Respondents,
Office & P.O. Address,
921 Bergen Avenue,
Jersey City, New Jersey

CORYDON B. DUNHAM,
Of Counsel.

To:

LASSER & LASSER, Esqs.,
Proctors for Libelant,

SIDNEY M. WITTNER, Esq.,
Of Counsel for Libelant,
11 West 42nd Street,
New York, N. Y.

Notice of Motion

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civ. No. 649-52

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the Libel herein, the answer, the Judge's minutes of the trial, the minutes of the trial, the findings of fact and conclusions of law filed herein, October 3, 1956, the amendment of findings of fact and conclusions of law and upon all the papers and proceedings heretofore had herein, respondent, Ernest E. Fuchs, will move this Court before Honorable Thomas F. Meaney, at the United States Court House, held in the Post Office Building, Federal Square, Newark, New Jersey, on the 13th day of November, 1956, at 10:30 A.M. or as soon thereafter as counsel can be heard for an order:

(a) Granting a reargument and reconsideration herein of this Honorable Court's opinion, findings of fact and conclusions of law.

(b) Including in this Honorable Court's opinion in recitation of Libelant's testimony for clarification the following, being facts and inferences therefrom:

(1) At all times since its incorporation and particularly between the period covering the year 1947 and July 31, 1951, Sandy Hook, Inc. was a corporation duly organized and existing under and by virtue of the laws of the State of New York;

(2) At all times during operations of the vessel Sandy Hook, Sandy Hook, Inc., between the years 1947 to the year 1951, was engaged in the business of transporting passengers for hire from New York to Atlantic Highlands and return and operating, managing and controlling said vessel in said business;

(3) At all times from about the year 1947 up to but not including July 31, 1956 Sandy Hook, Inc., owned the vessel Sandy Hook. (S.M. 171—LI. 21-25-Sm 172—LL 1-2).

(4) At all times from about the year 1947 to her damage in 1951 Sandy Hook, Inc., operated the said vessel Sandy Hook, in its business as aforesaid;

(5) At all times from the year 1947 up to but not including July 31, 1951 the said Sandy Hook, Inc., controlled the said Sandy Hook in its business as aforesaid;

(6) At all times during operations of the Sandy Hook, Inc., from about the year 1947, Libelant was the president of said corporation, until about July 31, 1951;

(7) At all times mentioned during the operations of the vessel Sandy Hook, as aforesaid, Libelant acted on behalf of said corporation, Sandy Hook, Inc., and not as an individual in the operation of the said vessel;

(8) That prior to and between July 2, 1951 and July 10, 1951 various charters had previously been obtained and others were obtained and being obtained by Sandy Hook, Inc., during the regular course and scope of its business;

(9) The charters and contracts referred to in the evidence in this suit, obtained before July 31, 1951 by Sandy Hook, Inc., and those charters obtained between

the period July 2, 1951 up to but not including July 31, 1951 were the property of Sandy Hook, Inc. during those periods;

(10) Libelant Gardner was not the owner of any of the charters upon which he claims damage (as is indicated by the fact that such charters were at the time of trial in the warehouse where the trustee of Sandy Hook, Inc. deposited the corporation's papers (S.M. 251—LL 14-17). The Sandy Hook and Calvert charters were interrelated according to Libelant. Sandy Hook charters were transferred to the Calvert (S.M. 251—7-11));

(11) If there was any loss or damage it was loss and damage to Sandy Hook, Inc., a corporation of which Libelant was only an officer;

(12) Sandy Hook, Inc. was not a party to the alleged charter with Respondents. As it was, according to Libelant, his own personal agreement as evidenced by his words as follows: "* * Well, on the last page it has provisions for the signature in one case Sound Steamship Lines and in the other case it had a corporate, president of a corporation should sign, and *I knew that dealing as an individual that I could not sign that particular charter party in that form.*" * * (S.M.P. 120 LL)

(13) There is no evidence of the assignment of charters made and to be made from the corporate entity Sandy Hook, Inc., to Charles Gardner, before July 31, 1951, the date of the adjudication of bankruptcy of said corporation. (Authorization by application in open court as to sale of the material to Respondents (S.M.P. 182 LL, 24-25, S.M.P. 183 10-14) would infer that Court approval was necessary. Regardless, the charters hav-

ing been shown to have been obtained by Sandy Hook, Inc., and no change of ownership having been shown, the presumption of ownership by Sandy Hook, Inc. prevails.)

(14) The loss if any would be that of Sandy Hook, Inc., who is not a party to negotiations with Respondents and that Gardner might indirectly have sustained damage does not bring the damage within the contemplation of Respondents or the contract, there being no privity of contract between Sandy Hook, Inc. and Respondent;

(15) On *July 2, 1951,* according to Libelant's recollection, the downpayment of $5,000.00 was discussed (S.M. 102 LL 24-25) (S.M. 103 L 1), but had not been agreed upon on that day. (S.M. 102 LL 18-23)

(16) On *July 5, 1951,* between 1:00 and 3:00 P.M. at Bethlehem Yard, (S.M. 108 LL 17-19 LL 23-24), Libelant and Respondent agreed the terms and conditions and conditions of the charter would be reduced to writing. (S.M. 105 LL 1-13) (S.M. 106 LL 16-20) also on this date (S.M. 127 LL 5-7) a sale of materials to be delivered to the vessel by Libelant, was agreed upon (S.M. 127 LL 5-14); on this date, (S.M. 147 L 12-21) Libelant agreed to assist Mr. Fuchs in Coast Guard inspection by putting a crew on board. (S.M. 147 L 15-21). (S.M. 148 last line) (149 LL 1-7) on this date and time, 1:00 P.M. and 3:00 P.M. (S.M. 108 LL 17-19—LL 23-24) Libelant discussed a performance bond with Mr. Fuchs (S.M. 107 LL 9-11), on leaving Mr. Fuchs it still had not been resolved as he discussed it with his insurance agent in the afternoon of July 5th at about 4:30 P.M. (S.M. 109 LL 2-7), Libelant did not know the significance of a performance bond as it was accepted in the maritime business (S.M. LL 16-19) al-

though he heard it used in many occasions (S.M. 111 LL 21-24), it was not until the evening of July 5th that Libelant called Mr. Fuchs and suggested he put his own engineer on the Diesel (S.M. 114 LL 23-25 S.M. 1-4);

(17) On *July 8, 1951,* Libelant delivered to the vessel the material sold by him on July 5, 1951. (S.M. 127 LL 5-13); and the crew was put on board to work for Mr. Fuchs (S.M. 233 LL 4-8), the duties of the crew was to take any instructions from Mr. Fuchs that he cared to give them and follow them. (S.M. 154 LL 11-12) Mr. Fuchs had control over the Master after Gardner put the crew aboard. (S.M. 154 LL 22-24) the crew was working for Fuchs and not Libelant (S.M. 233 LL 4-8).

(c) Including in this Honorable Court's opinion for clarification, Mr. Fuchs contention that both parties negotiated orally as to the terms of an agreement but both intended and in fact agreed to execute a written contract embodying the terms agreed upon. (S.M. 105 LL 1-12).

(d) Modifying and resettling the Court's findings of fact and conclusions of law to embody the Libelant's testimony, and the legal conclusions decided thereon.

(e) Supplementing the findings of fact and conclusions of law by a showing, that Libelant never received possession or control of the vessel as charterer or otherwise.

(f) Supplementing the conclusions of law by showing:

(1) That the contract of sale of the equipment and putting the crew on board were collateral contracts to the charter arrangement found by this Honorable

Court (as each were separately explained). (One a sale, the other as a favor to Mr. Fuchs);

(2) That there is no United States Coast Guard regulation or United States or other Law preventing written agreements of charters of vessels being entered into before a vessel is certificated by the United States Coast Guard.

(g) Reconsideration of the damages and eliminating all except the damages for sale of equipment and supplying services of the crew on the grounds that according to Libelant and this Honorable Court's findings, the agreement found was between Respondents and Libelant in his individual capacity and all other damages were sustained by Sandy Hook, Inc., who was not a party to the contrant and had no privity to it. That it was Libelant's charter is evidenced by the fact that it was his money borrowed and not that of Sandy Hook, Inc., he carried in his pocket to consummate this deal. Hence, Sandy Hook, Inc.'s damages could not have been within the contemplation of the parties or Respondents. Nor can it be said that Libelant could have, as an officer of/or the corporation, turned over its charters and prospective charters to his individual profit. This would have resulted, had they turned them over to a vessel that this Honorable Court found that Mr. Gardner chartered. This would be accompliishing indirectly that which he could not have accomplished directly. It would as in the case of the equipment required order of the Court. No such authorization has been shown, nor has any such transfer been indicated in the record. The fact that Libelant later acquired the trustee's interest in the Bankruptcy's Estate did not change the relationship of Sandy Hook, Inc., as to the alleged charter. It was an absolute stranger to it. That its president acting for himself was endeavoring to

obtain a charter did not change its status. In taking over the trustee's interest in the estate, Libelant stepped into the trustee's shoes. The trustee had no suit on Libelant's alleged contract against Respondents. It was not a party to the contract. Libelant may not combine his claim for a breach of contract with the damages sustained by another, not a party to the contract and expect a recovery on two unrelated propositions. Libelant's damages alone should be considered.

(h) Directing and opening of this case for the purpose of introducing documentary evidence of ownership of the charter parties, and prospective charter parties, the lack of authorization of the debtor in possession, Sandy Hook, Inc., between June 2, 1951 and June 10, 1951 to transfer any of its charters or prospective charters to Charles Gardner individually without a consideration or in payment of a past consideration, or otherwise without specific order of the Referee in Bankruptcy, for the purpose of offering evidence that the damages alleged to have been sustained by Libelant if at all sustained were sustained by persons other than parties to the alleged charter and that, this Libelant, in fact sustained no damage whatsoever as the result of charters or respective charters or other matters incidental to such charters.

(i) Directing a dismissal of the Libel and complaint as to the Defendant Ernest L. Fuchs as all evidence including Libelant's testimony demonstrates that at all times he acted as an officer of Sound Steamship Lines and not otherwise.

(j) Restraining the Libelant from disposing or permitting disposal of any of his records or those of Sandy Hook, Inc., pending final disposition of this case, and

Notice of Motion

PLEASE TAKE FURTHER NOTICE that, Respondent, Ernest L. Fuchs, will move for such other, further and different relief as may be just and equitable in the premises.

Dated: New York, New York
October 29, 1956.

Yours, etc.,

MARCEL WAGNER
Proctor for Respondents
Office & P.O. Address
921 Bergen Avenue
Jersey City, New Jersey

MILTON, MCNULTY and AUGELLI
by Joseph Keane
Journal Square
Jersey City, New Jersey
Of Counsel.

CORYDON B. DUNHAM
60 Broad Street
New York City
Of Counsel.

MAURICE J. SMITH
52 Wall Street
New York City
Of Counsel.

To:

LASSER & LASSER, ESQS.
Proctors for Libelant

SIDNEY M. WITTNER, ESQ.
Of Counsel for Libelant
11 West 42nd Street
New York, New York.

Notice of Motion

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civ. No. 649-52

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the Libel herein, the answer, the Judge's minutes of the trial, the minutes of the trial, the findings of fact and conclusions of law filed herein, October 3, 1956, the amendment of findings of fact and conclusions of law and upon all the papers and proceedings heretofore had herein, respondent, Sound Steamship Lines, Inc., will move this Court before Honorable Thomas F. Meaney, at the United States Court House, held in the Post Office Building, Federal Square, Newark, New Jersey, on the 13th day of November, 1956, at 10:30 A.M. or as soon thereafter as counsel can be heard for an order:

Granting similar relief sought in the Notice of Motion of respondent, Ernest E. Fuchs, dated October 29, 1956, and for a further order dismissing the libel and complaint as to respondent, Sound Steamship Lines, Inc., on the ground that if the findings of fact and conclusions of law intended to hold Ernest E. Fuchs a party to the alleged parole charter, then said charter was not between the respondent, Sound Steamship Lines, Inc., and libelant, and

PLEASE TAKE FURTHER NOTICE, that respondent, Sound Steamship Lines, Inc., will move for such other, further and

different relief as to this Honorable Court may seem just and proper.

Dated, New York, October 29th, 1956.

Yours, etc.,

MARCHL WAGNER,
Proctor for Respondents,
Office & P. O. Address,
921 Bergen Avenue,
Jersey City, New Jersey.

MILTON, MCNULTY AND AUGHELLI,
By JOSEPH KRANE,
40 Journal Square,
Jersey City, New Jersey.
Of Counsel.

CORYDON B. DUNHAM,
60 Broad Street,
New York 5, N. Y.
Of Counsel for Respondent.

Sound Steamship Lines, Inc.
MAURICE J. SMITH,
52 Wall Street,
New York, N. Y.
Of Counsel.

To:

LASSER & LASSER, Esqs.,
Proctors for Libelant.

SIDNEY M. WITTNER, Esq.,
Of Counsel for Libelant,
11 West 42nd Street,
New York, N. Y.

Notice of Motion

UNITED STATES DISTRICT COURT

District of New Jersey

[Same Title]

Sirs:

Please take notice that upon the Libel herein, the answer, the Judge's minutes of the trial, the minutes of the trial, the findings of fact and conclusions of law filed herein, October 3, 1956, the amendment of findings of fact and conclusions of law and upon all the papers and proceedings heretofore had herein, respondent, Ernest E. Fuchs, will move this Court before Honorable Thomas F. Meaney, at the United States Court House, held in the Post Office Building, Federal Square, Newark, New Jersey, on the 13th day of November, 1956, at 10:30 A.M. or as soon there after as counsel can be heard for an order:

Granting similar relief sought in the Notice of Motion of respondent, Ernest E. Fuchs, dated October 29, 1956, and for a further order dismissing the libel and complaint as to respondent, Sound Steamship Lines, Inc., on the ground that if the findings of fact and conclusions of law intended to hold Ernest E. Fuchs a party to the alleged parole charter, then said charter was not between the respondent Sound Steamship Lines, Inc., and libelant, and

Please take further notice, that respondent, Sound Steamship Lines, Inc., will move for such other, further

and different relief as to this Honorable Court may seem just and proper.

Dated, New York, October 29th, 1956.

Yours, etc.,

MARCEL WAGNER,
Proctor for Respondents,
Office & P. O. Address,
921 Bergen Avenue
Jersey City, New Jersey.

MILTON, McNULTY and AUGELLI,
By JOSEPH KRANZ,
40 Journal Square,
Jersey City, New Jersey,
Of Counsel.

CORYDON B. DUNHAM
60 Broad Street
New York 5, N. Y.
Of Counsel for Respondent,
Sound Steamship Lines, Inc.

MAURICE J. SMITH
52 Wall Street
New York, N. Y.
Of Counsel

To:

LASSER & LASSER, Esqs.,
Proctors for Libellant.

SIDNEY M. WITTNER, Esqs.,
Of Counsel for Libellant,
11 West 42nd Street,
New York, N. Y.

Notice of Appeal

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil Action 649-1952

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that the Respondents, Ernest E. Fuchs and Sound Steamship Line, Inc., hereby appeal to the United States Court of Appeals for the Third Circuit from the final decree and final judgment dated and filed in this action on December 5, 1956 and entered in this action on December 6, 1956 and the said Respondents hereby appeal from each and every part of said final decree and judgment, as well as the whole thereof.

Dated: Jersey City, New Jersey
December 7, 1956.

MARSHALL WAGNER, ESQ.
Proctor for Respondents
921 Bergen Avenue
Jersey City, New Jersey

To:

HANNOCH, LASSER, WEINSTEIN & MEYERS
Proctors for Libellant
17 Academy Street
Newark, New Jersey

SIDNEY M. WITTNER, ESQ.
Of Counsel for Libellant
11 West 42nd Street
New York, New York

Libel

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

To the Honorable Justices of the United States District Court for the District of New Jersey in Admiralty:

The Libel and Complaint of Charles Gardner against the M/V "Calvert" her engines, boilers, machinery, tackle, fittings, equipment, spare parts, furniture, fixtures, improvements and apparatus, and against ERNEST E. FUCHS and SOUND STEAMSHIP LINES, INC., her owners and against all other persons lawfully intervening for their interests herein in a cause of contract, civil and maritime, alleges upon information and belief as follows:

FIRST CAUSE OF ACTION

1) That the said motor vessel "Calvert" is owned by Ernest E. Fuchs and Sound Steamship Lines, Inc., the latter being a corporation organized under the laws of the State of Delaware, with its principal place of business in New York.

2) That between on or about July 2nd and July 10, 1951 libellant at the special instance and request of the Respondents, Libellant hired a crew and furnished supplies and equipment for the boat, such as, life preservers, fire extinguishers, chairs and other miscellaneous items shown in the schedule annexed hereto, and expended in connection therewith the sum of $7,900.

3) That the said expenditures were necessary to said vessel and were rendered upon the credit of the said vessel as well as the credit of the owners.

Libel

4) That by reason of the premises the said vessel and the owners are indebted to the Libellant in the sum of $7,900 with interest, which libellant duly demanded of the owners but same was refused, and same is now duly payable to libellant with interest.

5) Libellant claims a maritime lien against the said M/V "Calvert", her engines, boilers, machinery, tackle, fittings, equipment, spare parts, furniture, fixtures, improvements and apparatus, and under and by virtue of the Acts of Congress of the United States of America and the General Maritime Law.

6) That the M/V "Calvert" is now in the Harbor at Perth Amboy, New Jersey, and within the District of New Jersey.

7) That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

SECOND CAUSE OF ACTION

8) That the said motor vessel "Calvert" is owned by Ernest Fuchs and Sound Steamship Lines, Inc., the latter being a corporation organized under the laws of the State of Delaware, with its principal place of business at New York.

9) That between on or about July 5th and July 10, 1951 Libellant and Ernest E. Fuchs acting for himself and the Sound Steamship Lines, Inc. entered into an oral charter agreement at the Port of New York for the said M/V "Calvert" pursuant to which libellant was to operate said vessel for excursions and charter parties between New York and Atlantic Highlands, New Jersey.

10) That thereafter and on or about July 10, 1951 said Fuchs and Sound Steamship Lines, Inc. breached the said charter agreement and withdrew the said vessel from the libellant.

11) That the said vessel was also equipped with and had facilities for the serving of refreshments and it was contemplated by the parties that such refreshments would be served in connection with the operation of the vessel under the charter and that libellant would derive additional revenue therefrom.

12) That by reason of the breach libellant was deprived of the income from the operation of the said vessel and sustained damages in the sum of $100,000.

WHEREFORE, libellant prays that process of attachment in due form of law, according to the course of this Honorable Court in cases of Admiralty and Maritime jurisdiction, may issue against the said M/V "Calvert", her engines, boilers, machinery, tackle, fittings, equipment, spare parts, furniture, fixtures, improvements and apparatus and that citation issue against said Ernest E. Fuchs and Sound Steamship Lines, Inc., and all other persons having or pretending to have any right, title or interest therein, and that they may be compelled to appear and answer upon oath all and singular the matters aforesaid; and that if the said Ernest E. Fuchs and the Sound Steamship Lines, Inc. cannot be found that an attachment may issue against their goods and chattels and if none be found that their credits and effects in the hands of any person within the jurisdiction of this court be garnisheed and attached and the said garnishees summoned to answer on oath as to the rights, credits and effects in their hands; that the said M/V "Calvert", her engines, boilers, machinery, tackle, improvements and apparatus may be condemned and sold to pay the same; and that this Honorable Court will be pleased

to decree payment of the damages aforesaid, with costs; and that the libellant may have such other and further relief as he may be entitled to receive.

SIDNEY M. WITTNER,
Attorney and Proctor for Libellant,
O. & P.O. Address,
#11 W. 42nd Street,
Borough of Manhattan,
City of New York.

HANNOCH, LASSER, WEINSTEIN & MEYER,
By Aaron Lasser,
Of Counsel with Libellant.

Wages expended for the crew.....	$ 350.00
830 life preservers @ $3.75.....	3,112.50
610 chairs @ $2.80.....	1,708.00
2 Fire extinguishers @ $15.....	30.00
1 new 8" line (9 fathoms).....	250.00
Deck equipment, brooms, mops & paint.....	500.00
Mattresses and bedding for 7 or 8 of crew....	150.00
Captain Jenk's furniture.....	250.00
Miscellaneous equipment—for ladies room, hospital dispensers, machines for Kotex.....	200.00
1 Aluminum gang plank.....	750.00
2 trips of the M/V "Sunshine" to move the equipment to the M/V "Calvert".....	600.00
	$7,900.00

Verified on May 12, 1952.

Monition and Citation

UNITED STATES DISTRICT COURT

District of New Jersey

Civil 649-52

The President
of the United States of America

To the Marshall of the District of New Jersey—Greeting:

Whereas a libel was filed in the United States District Court for the District of New Jersey on July 10th, 1952 by Charles Gardner, Libellant against the M/V Calvert, her engines, boilers, machinery, tackle, fittings, equipment, etc. and also against Ernest E. Fuchs and Sound Steamship Lines, Inc., her owners and against all other persons lawfully intervening for their interests, Respondent and praying the usual process in that behalf to be made;

You are therefore hereby commanded to attach the said
or vessel, her engines, boilers, tackle, etc., and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court to be held at Newark in and for the District of New Jersey on the 26th day of August, 1952 at ten o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf;

And we do further command you, the said Marshal, that you cite and admonish the said Respondents, if found

in your District, to l e and appear before the said District Court in the City of Newark at 10:00 a. m. on the 26th day of August, 1952 then and there to answer or except to said libel.

And what you shall have done in the premises, do you then and there make return thereof together with this writ.

WITNESS, the Honorable Judges of said Court at the City of Newark on this 10th day of July, 1952.

WILLIAM H. TALLYN, Clerk
By VERA A. ALEXANDER, Deputy

(Seal)

Notice of Allocation

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil 649-52

[SAME TITLE]

Pursuant to Rule 8 of the General Rules of this Court, I have allocated the above-entitled matter to *Newark, New Jersey.*

Please file pleadings and make all motions returnable there.

THIS ACTION HAS BEEN ASSIGNED TO JUDGE THOMAS F. MEANEY.

WILLIAM H. TALLYN, Clerk
By VERA A. ALEXANDER, Deputy Clerk

Dated: July 10, 1952

Claim of Owner

DISTRICT COURT OF THE UNITED STATES

DISTRICT OF NEW JERSEY

[SAME TITLE]

And now appears Sound Steamship Lines, Inc., by its President, Ernest E. Fuchs, intervening for itself as owner of the Motor Vessel Calvert, before this Honorable Court and makes claim for the said M/V Calvert, her tackle, apparel and furniture, as the same are proceeded against at the instance of Charles Gardner, libelant herein. And the said Ernest E. Fuchs, as president of said claimant, Sound Seamship Lines, Inc., avers that it was at the time of the filing of this libel herein, and still is, the true and bona fide sole owner of the M/V Calvert and that no other person is the owner thereof; wherefore he prays to defend accordingly.

Dated, July 25, 1952.

SOUND STEAMSHIP LINES, INC.,

By ERNEST E. FUCHS
President.

CORYDON B. DUNHAM,
Proctor for Claimant
Office & P. O. Address
20 Broad Street
Borough of Manhattan
City of New York, N. Y.

MARCEL WAGNER,
Proctor for Claimant
Office & P. O. Address
40 Journal Square
Jersey City, New Jersey
(Verified on July 25, 1952.)

Answer of Sound Steamship Lines, Inc.

To the Honorable the Judges of The United States District Court for the District of New Jersey:

The answer of Sound Steamship Lines, Inc., respondent and as claimant of the M/V CALVERT, her engines, equipment, etc., to the libel and complaint herein of Charles Gardner against M/V CALVERT, Ernest Fuchs and Sound Steamship Lines, Inc., in an alleged cause of breach of contract, civil and maritime, alleges as follows:

FIRST: Claimant-respondent admits the matters alleged in the First Article of the libel, except that it denies that the motor vessel CALVERT is owned by Ernest Fuchs and that its principal place of business is in New York.

SECOND: Claimant-respondent denies the matters alleged in the Second Article of the libel herein, except that it is without information sufficient to form a belief as to the crew and equipment allegedly furnished to the motor vessel CALVERT and their respective values.

THIRD: Claimant-respondent denies the allegations contained in the Third Article of the libel.

FOURTH: Claimant-respondent denies the allegations contained in the Fourth Article of the libel.

FIFTH: Claimant-respondent denies the allegations contained in the Fifth Article of the libel.

SIXTH: Claimant-respondent admits the allegations of Article Sixth of the libel.

SEVENTH: Claimant-respondent admits the jurisdiction of this Court but denies the premises are true.

Further Answering the Libel, Claimant-Respondent Alleges upon Information and Belief

EIGHTH: Claimant-respondent admits that it is a corporation organized under the laws of the State of Delaware and is the owner of the motor vessel CALVARY, but except as admitted, it denies the allegations contained in the Eighth Article of the libel herein.

NINTH: Claimant-respondent denies the allegation contained in Article Ninth of the libel herein, but admits that there were preliminary negotiations with respect to a bareboat charter party contemplating the operation of the said vessel by a steamship company or a racing association with satisfactory financial rating or stability for excursions and charter parties between New York and Atlantic Highlands, New Jersey.

TENTH: Claimant-respondent denies the allegations contained in Article Tenth of the libel herein.

ELEVENTH: Claimant-respondent denies the allegations contained in Article Eleventh of the libel herein.

TWELFTH: Claimant-respondent denies the allegations contained in Article Twelfth of the libel herein.

Further Answering the Libel, Claimant-Respondent Alleges upon Information and Belief

THIRTEENTH: That on or after July [illegible] 1951, the respondent, Ernest E. Fuchs, acting on behalf of the respondent, Sound Steamship Lines, Inc., tendered to libelant acting on behalf of certain undisclosed principal or principals, the Motor Vessel M/V CALVARY for charter pursuant to the terms and conditions contained in a certain proposed bareboat charter party agreement, providing for the hire

Further Answering the Libel, Claimant-Respondent Alleges upon Information and Belief

of said vessel for a period of twenty-eight (28) days beginning July 7, 1951, and ending August 8, 1951, both dates inclusive, Sundays not included, at $400.00 per day. Libelant promised to have said agreement executed by a party, as charterer, whose financial responsibility was satisfactory to him, and to return the same to him on or before July 7, 1951, the day agreed upon for the delivery of said vessel provided the conditions contained in said agreement, with respect to the procurement of a performance bond in the amount of $50,000.00, and certain policies of marine insurance had been complied with. That libelant failed to return said charter party agreement duly executed by a charterer financially satisfactory to said respondent and to perform the terms and conditions on the part of the charterer to be performed at the time of delivery of said vessel.

FOURTEENTH: Claimant-respondent has duly performed all and singular the terms and conditions of the said charter party on its part to be performed.

FIFTEENTH: All and singular the premises are true.

WHEREFORE, claimant-respondent prays that the libel herein be dismissed with costs, and that the claimant-respondent may have such other and further relief as the justice of the cause may require.

.....

MARCEL WAGNER
Proctor for Claimant Respondent
Sound Steamship Lines, Inc.
40 Journal Square
Jersey City, N. J.

Further Answering the Libel, Claimant-Respondent Alleges upon Information and Belief

STATE OF
COUNTY OF } ss.:

ERNEST E. FUCHS, being duly sworn, deposes and says:

That he is President of Sound Steamship Lines, Inc., a corporation, the respondent-claimant herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason this verification is made by deponent is that Sound Steamship Lines, Inc. is a corporation, and deponent is an officer thereof, to wit, its President.

That the sources of deponent's information and the grounds of his belief as to all matters not stated in the said answer to be alleged upon his own knowledge are reports made to him by employees of said corporation and information received in response to inquiries which he has caused to be made and which information he believes to be true.

/s/ ERNEST E. FOCHS

Sworn to before me this
17th day of Sept., 1952.

Interrogatories Propounded to the Libelant which he is Required to Answer in Writing Under Oath

FIRST: Please state (a) the place where in New York and (b) the time when (stating date and hour of day), it is claimed that the libelant and respondent Ernest Fuchs, on behalf of the respondent Sound Steamship Lines, Inc., entered into and concluded an oral charter agreement covering the motor vessel CALVERT.

Interrogatories Propounded to the Libelant which he is Required to Answer in Writing Under Oath

SECOND: If it is claimed that negotiations were had at different times and places before said charter agreement was finally concluded, please state specifically (a) the place or places where and (b) the time or times when such preliminary negotiations were had.

THIRD: Please state for how long a period of time it is alleged that the CALVERT was to be chartered by the respondent Sound Steamship Lines, Inc. to the libelant herein.

FOURTH: Please state what rate of charter hire it is alleged was agreed the libelant should pay.

FIFTH: Please state (a) when, (b) where, and (c) in what manner said charter hire was to be paid.

SIXTH: Please state (a) the place where and (b) the time when (giving date and hour of day) it is claimed that the CALVERT was delivered by the respondent Sound Steamship Lines, Inc. to libelant herein.

SEVENTH: Please state (a) the place where and (b) the time when (giving date and hour of day) it is claimed that the CALVERT was withdrawn from the libelant as alleged in Article "10" of the libel herein.

EIGHTH: Please state what act or acts on the part of the respondent Sound Steamship Lines, Inc. it is alleged constituted a breach or breaches of the charter party agreement as alleged in Article "10" of the libel herein.

NINTH: Please state whether (a) it is claimed that libelant paid to the respondent Sound Steamship Lines, Inc., or to anyone on its behalf, charter hire of any kind for the use or contemplated use of said vessel, and if so (b) how much was paid and (c) when and where.

TENTH: Please state if it is not a fact that libelant as a part of his agreement to charter the CALVERT agreed

Interrogatories Propounded to the Libelant which he is Required to Answer in Writing Under Oath

to procure marine insurance in connection with the operation by it of said vessel.

ELEVENTH: If the foregoing interrogatory is answered in the affirmative, please state (a) what insurance libelant procured (whether hull insurance, protection and indemnity insurance, or charterer's liability insurance), and (b) in what amounts and (c) the name of the insurance carrier in each instance.

TWELFTH: Please state whether or not it is a fact that libelant agreed to pay for all fuel used by the CALVERT during the period of the charter agreement.

THIRTEENTH: Please state (a) between what ports or terminals libelant proposed to operate the CALVERT as an excursion vessel and (b) what schedule libelant proposed to maintain.

FOURTEENTH: Please state between what ports or terminals libelant proposed to operate said vessel for charter parties as alleged in said libel.

FIFTEENTH: Please state by whom it is alleged the concession referred to in Article "11" of the libel herein was to be operated.

SIXTEENTH: Please state in what respect it is alleged that libelant was damaged in the amount of $100,000, as alleged in Article "12" of the libel herein, stating the alleged elements of loss or damage involved and how the alleged monetary damage is allegedly derived therefrom.

SEVENTEENTH: Please state whether the supplies alleged to have been furnished the CALVERT as alleged in Article "2" of the libel herein were furnished as a condition under said charter agreement or as a purveyor (ship chandler) of ship supplies.

Answer of Ernest E. Fuchs

To the Honorable the Judges of the United States District Court for the District of New Jersey:

Civil 619-52

The answer of the respondent Ernest E. Fuchs to the libel and complaint herein of Charles Gardner against M/V CALVERT, Ernest Fuchs and Sound Steamship Lines, Inc., in an alleged cause of breach of contract, civil and maritime, alleges as follows:

FIRST: Respondent admits the matters alleged in the First Article of the libel, except that he denies that the motor vessel CALVERT is owned by him and that the principal place of business of the respondent Sound Steamship Lines, Inc. is in New York.

SECOND: Respondent denies the matters alleged in the Second Article of the libel herein, except that he is without information sufficient to form a belief as to the crew and equipment allegedly furnished to the motor vessel CALVERT and their respective values.

THIRD: Respondent denies the allegations contained in the Third Article of the libel.

FOURTH: Respondent denies the allegations contained in the Fourth Article of the libel.

FIFTH: Respondent denies the allegations contained in the Fifth Article of the libel.

SIXTH: Respondent admits the allegations of Article Sixth of the libel.

Answer of Ernest E. Fuchs

SEVENTH: Respondent admits the jurisdiction of this Court but denies the premises are true.

EIGHTH: Respondent admits that Sound Steamship Lines, Inc. is a corporation organized under the laws of the State of Delaware and is the owner of the motor vessel CALVERT, but except as admitted, he denies the allegations contained in the Eighth Article of the libel herein.

NINTH: Respondent denies the allegation contained in Article Ninth of the libel herein, but admits that there were preliminary negotiations with respect to a bareboat charter party contemplating the operation of the said vessel by a steamship company or a racing association with satisfactory financial rating or stability for excursions and charter parties between New York and Atlantic Highlands, New Jersey.

TENTH: Respondent denies the allegations contained in Article Tenth of the libel herein.

ELEVENTH: Respondent denies the allegations contained in Article Eleventh of the libel herein.

TWELFTH: Respondent denies the allegations contained in Article Twelfth of the libel herein.

WHEREFORE, respondent prays that the libel herein be dismissed with costs, and that he may have such other and further relief as the justice of the cause may require.

(Verified September 17, 1952)

Answer to Interrogatories by Libelant

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

[SAME TITLE]

Libelant answering the interrogatories, alleges as follows:

1. (a) The agreement was entered into at the Bethlehem Shipyards at Mariners Harbor, also by telephone from libelant's office and home in Jersey City to Ernest Fuchs in Belle Harbor.

(b) The agreement was made on July 5, 1951 at about 3 PM at the Bethlehem Shipyards and was confirmed and concluded the same day by telephone from libelant to Ernest Fuchs at about 7:30 PM and the vessel was delivered to libelant and his crew went aboard the vessel on the afternoon of July 8, 1951 on board the "Calvert".

2. Prior negotiations were had at different times about one month before July 5, 1951 at the Bethlehem Shipyards and by telephone from libelant from his home or from his office and from other places to Ernest Fuchs, both at his home and at the Bethlehem Shipyards, but libelant is unable to specify the number of calls or the exact moment of each call, except that there were a number of such calls.

3. The "Calvert" was to be chartered from July 10, 1951 to the end of the racing season on or about August 8, 1951, and thereafter on a special charter arrangement as libelant should need same until after Labor Day, viz, on or about September 4, 1951.

Answer to Interrogatories by Libelant

4. The charter hire was fixed at $400 per day for the entire racing season, including Sundays and $400 a day thereafter as the vessel should be needed by the libelant.

5. The charter hire was to be paid as follows:

$5,000 in advance upon the completion of inspection by the Coast Guard and delivery of the certificate of inspection to libelant and the balance on a daily basis in advance. No specific place where the payment was to be made was fixed, but libelant was agreeable to pay same at any place desired by respondent, namely, either at libelant's office, at the "Calvert", at Mr. Fuchs' home, or any place he might designate.

6. The "Calvert" was delivered to libelant on the afternoon of July 8, 1951 at the Bethelehem Shipyards.

7. The "Calvert" was withdrawn from libelant on July 10, 1951 at about 4:30 PM at the Bethlehem Shipyards.

8. The respondent breached the charter agreement by Ernest Fuchs removing the ship's papers before the delivery of the certificate of inspection and by causing the boat to be towed out of the Bethlehem Shipyards to Perth Amboy and placing same in dead storage and advising that unless libelant's crew was removed from the vessel they would have no food or sanitary facilities on board and by denying to libelant further access to the vessel.

9. Libelant tendered $5000 in cash to respondent through Ernest Fuchs on board the vessel on July 10, 1951.

10. The libelant agreed to procure marine insurance in connection with the operation of the vessel.

11. Libelant had arranged to procure through Despard and Company hull and port insurance in the amount of $75,000 and protection and indemnity insurance in the

amount of $250,000; the insurance was to be in the name of respondent and the charterer as their interest may appear and was to take effect as soon as the vessel was ready to leave the Bethlehem Shipyards.

12. Libellant agreed to pay for all fuel except such fuel as may have been in the tanks at the time the vessel was delivered to libellant.

13. The vessel was to operate during the racing season between Pier 80 North River, New York City and 69th Street, Brooklyn and Atlantic Highlands, New Jersey and on special charter contracts in New York Harbor and the Hudson River. Libellant proposed to maintain a schedule during the racing season between 11:15 A.M. and 8:30 P.M. between New York and Atlantic Highlands and in addition for special charter parties on Sundays and for moonlight sails and day charters. The time of the special charters varied, but generally ran from 9 A.M. to 8 P.M. for day charters and from 9 P.M. to midnight for moonlight sails.

14. The charter parties were to operate from Pier 80 North River, 135th Street and Hudson River, Brooklyn, New York and Jersey City to Rye Beach and on special cruises in New York Harbor.

15. The concession was to be operated by James Hill.

16. The damage is computed on the following basis:

Income from Ticket sales:

Minimum daily income during the racing season computed at 800 passengers per trip at $2.50 round trip, for 26 days.....	$ 52,000

1 afternoon trip, computed at a minimum of 400 passengers per trip at $2.50 round trip, for 26 days..		26,000	
24 moonlight sails from July 10 to Sept. 4 at $1100 each sail.....		26,400	
4 day Sunday charters at $1500 each charter		6,000	
21 day charters from August 9 to Sept. 4 at $1100.....		23,100	
		$133,500	
Less: Expenses:			
$400 a day per charter for 55 days	$22,000		
$300 a day operating & maintenance expenses .	16,500	38,500	$ 95,000
AMOUNT BROUGHT FORWARD...			Net $ 95,000
Gross Income From Bar:			
To and from racetrack, minimum of $800 per day for 26 days.....		$ 20,800	
For afternoon sails @ $240 per day for 26 days.....		6,240	
For 24 moonlight sails from July 10 to Sept. 4 at $480 per sail.....		11,520	
For 4 Sunday day charters at $480.		1,920	
For 21 day charters from August 9 to Sept. 4 at $480.....		10,080	
		$ 50,560	
Less: Bar cost, 40% of gross.....		20,224	Net $ 30,336

Answer to Interrogatories by Libelant

Gross Income from Food:		
To and from racetrack, minimum of $800 per day for 26 days.....	$ 20,800	
For afternoon sails @ $240 per day for 26 days.....	6,240	
For 24 moonlight sails from July 10 to Sept. 4 at $480 per sail.....	11,520	
For 4 Sunday day charters at $480.	1,920	
For 21 day charters from August 9 to Sept. 4 at $480.....	10,080	
	$ 50,560	
Net income from concession—20% of gross of $50,560.....		$ 10,112
Total		$135,448

PLEASE TAKE NOTICE, that libellant will move upon the trial hereof to increase the amount of damages under the second cause of action from $100,000 to $135,448.

17. The supplies and equipment were furnished to the vessel upon the security of the vessel and were to be paid by respondent, respondent stating that he would pay for same either in cash or would apply same on account of charter hire, as libellant may prefer.

Dated: October 13, 1952.

Yours &c.,

HANNOCH, LASSER, WEINSTEIN & MYERS,
Proctors for Libellant,
#17 Academy Street,
Newark 2, N. J.

SIDNEY M. WITTNER, of counsel,
#11 W. 42nd Street,
New York 36, N. Y.

Notice of Appeal

DISTRICT COURT OF THE UNITED STATES

District of New Jersey.

[Same Title]

Sirs:

Please take notice that Charles Gardner as libellant herein hereby appeals to the United States Court of Appeals for the Third District, from so much of the order made on September 3, 1952 by United States District Judge Alfred E. Modarelli and filed herein in the office of the Clerk of said Court for the District of New Jersey on September 4th, 1952, which directs that the Respondents' "Second Exception" addressed to the "Second Cause of Action" contained in the libel filed by libellant, be sustained to the extent that the claim in the amount of $100,000 as alleged in said cause of action does not constitute a maritime lien and that the M/V "Calvert" be relieved of any liability to furnish a bond in connection with the said claim.

Dated: September 5, 1952.

Yours, etc.,

Hannoch, Lassen, Weinstein & Myers,
Proctors for Libellant,
#17 Academy Street,
Newark, New Jersey.

Sidney M. Wittner, Esq.,
Of Counsel,
#11 West 42nd Street,
New York, New York.

To:

Marcel Wagner, Esq.,
Proctor for Respondents,
40 Journal Square,
Jersey City, N. J.

Condon B. Dunham, Esq.,
Of Counsel,
20 Broad Street,
New York, New York.

Order

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

[SAME TITLE]

Present: KALODNER, STALEY and HASTIE, *Circuit Judges*.

Upon consideration of the motion by libellant for leave to docket the appeal in the above case and to file the record out of time, and of the affidavit on behalf of respondents in opposition to the motion,

It is ORDERED that the motion be, and it is hereby denied for want of jurisdiction.

By the Court,

KALODNER
Circuit Judge

April 21, 1953

Respondents' Exhibit 1

[Letterhead of]

SOUND STEAMSHIP LINES, Inc.

THIS BARE BOAT CHARTER PARTY made and concluded in the City of New York on the day of July, 1951, between the Sound Steamship Lines, Inc., P. O. Box 615, Perth Amboy, N. J., a corporation of the State of Delaware, owner of the Motor Vessel CALVERT, Official Number, 127606, hereinafter called the Owner, party of the first part, and the of a corporation of the State of , herinafter called the Charterer, party of the second part:—

WITNESSETH

1. TERM. The Owner lets to the Charterer, and the Charterer hires of the Owner of the M/V CALVERT, hereinafter called the Motor Vessel, for the period of 28 days, from July 7th, 1951 to August 8th, 1951, both dates inclusive, Sundays not included.

2. DELIVERY & REDELIVERY. The said Motor Vessel shall be delivered to the Charterer in the Port of New York, at the Bethlehem Shipyard, Mariners, Harbor, S. I., N. Y., where she now lies, on the 7th day of July, 1951, unless lost, and shall be redelivered to the Owner by the Charterer at the expiration of this Charter Party, at the Port of New York, in the same good order and condition as when delivered, ordinary wear and tear excepted.

3. ACCEPTANCE. The Charterer shall have a reasonable opportunity to inspect said Motor Vessel, and subsequent acceptance of delivery by the Charterer shall constitute full performance by the Owner of its obligations hereunder. Thereafter the Charterer shall not have or assert any claim

against the Owner on account of any representations or warranties expressed or implied with respect to said Motor Vessel.

4. The Motor Vessel shall be employed only is carrying passengers in the regular trade of the Charterer.

5. EXPENSES OF OPERATION. The Charterer, at its sole cost and expense, shall man, operate, victual, supply and repair said Motor Vessel, and shall pay all charges, costs and expenses of every nature and kind whatsoever incident to the use, operation and maintenance of said Motor Vessel.

6. STORES ON BOARD. The Charter shall accept and pay for all fuel and consumable stores belonging to the Owner on board at the time of delivery, and the Owner shall, on redelivery, pay for such fuel and consumable stores belonging to the Charterer as are left on board. Payment shall be made at the current market prices at the ports of delivery and redelivery on the respective dates of delivery and redelivery. Inventories of such fuel and consumable stores shall be taken and mutually agreed on in each instance.

7. EQUIPMENT. The Charterer shall have the use of all outfit, equipment and appliances on said Motor Vessel for the term of this Charter Party, and the same, or their substantial equivalent, shall be returned to the Owner when said Motor Vessel is redelivered, in the same good order and condition as when delivered, ordinary wear and tear excepted. An inventory shall be furnished the Charterer on delivery for verification.

8. HIRE AND PAYMENT. (a) The Charterer shall pay hire to the Owner, for the term of this Charter Party, the sum of Eleven thousand two hundred Dollars, (same being at the rate of $400.00 per day). (b) Hire shall be paid to the Owner in U. S. Currency or its equivalent, at the time of the signing of this Charter Party.

Respondents' Exhibit 1

9. Masters, Engineers and Crew. (a) The Charterer agrees to remove the Master, Chief Engineer or any other officer or member of the crew of said Motor Vessel on the written request of the Owner. (b) Notwithstanding anything to the contrary in this Charter Party, the Master, Engineer, Officers and Crew of said Motor Vessel shall, from the time of delivery of said Motor Vessel under this Charter Party to the Charterer, be employees of the Charterer only, and shall be paid by the Charterer only, as hereinabove provided.

10. Repairs: The Charterer, at its own expense, shall maintain said Motor Vessel in an efficient state in hull and machinery throughout the term of this Charter Party.

11. Indemnity as Charterer: The Charterer hereby indemnifies and agrees to hold the Owner and said Motor Vessel harmless of any and from all liens, charges, encumbrances, fines, penalties, forfeitures, seizures, suits, actions, proceedings, claims, costs and expenses of every nature and kind whatsoever, arising out of or in any way connected with the operation of said Motor Vessel under this Charter Party.

12. Liens: (a) Neither the Charterer nor the Master of said Motor Vessel shall have any rights, power or authority to create, incur, or permit to be imposed on the Motor Vessel any liens whatsoever, except for crew's wages and salvage. The Charterer agrees to carry a properly certified copy of this Charter Party on board said Motor Vessel with her papers, and on demand to exhibit the same to any person having business with the Motor Vessel which might give rise to any lien thereon, other than liens for crew's wages and salvage. The Charterer agrees to notify any person furnishing repairs, supplies, towage, or other necessaries to the Motor Vessel, that neither the Charterer nor the Master have any right, power or authority to create, incur, or permit to be imposed on the Motor Vessel any

liens whatsoever, except for crew's wages and salvage. Such notice, so far as may be practicable, shall be in writing.

(b) The Charterer agrees to post on said Motor Vessel in a conspicuous place, and to maintain during the term of this Charter Party, a notice reading as follows:—

"This Motor Vessel is the Property of the Sound Steamship Lines, Inc. It is under Charter to the.... ..... and by the terms of the Charter Party neither the Charterer nor the Master has any right, power or authority to create, incur, or permit to be imposed upon the Motor Vessel any liens whatsoever, except for crew's wages and salvage."

(c) The Charterer shall not incur, or permit to be incurred, during the term of this Charter Party, any charges, fines, penalties, indebtedness or liabilities which might constitute a lien on, or a cause of forfeiture of said Motor Vessel, or an obligation of the Owner; but, if, notwithstanding such undertaking, any such fine, charge, penalty, indebtedness or liability is incurred, the Charterer shall forthwith cause the same to be discharged.

13. Bonding Suits: The Charterer agrees that if said Motor Vessel shall be libeled, attached, seized or otherwise detained under process or color of legal authority, the Charterer shall forthwith notify the Owners in writing of such proceedings, and shall forthwith take steps as may be necessary to discharge or release said Motor Vessel therefrom within five days from the date at which the same became effective, by filing a bond or undertaking or by securing such discharge or release by stipulation or otherwise.

14. Insurance:— (a) The Charterer shall, at its own expense, while and so long as this Charter Party remains in force, keep said Motor Vessel, the Charterer and the Owners fully insured by such kinds of insurance, including war risks, strikes, riots, etc., and under such forms of Poli-

cies and in amounts in dollars as follows:— Hull and Machinery and Disbursements (with the Maerican Time Institute Hull Clause) in the Total Amount of $75,000.00. Protection and Indemnity Insurance (with a Deductible average of not over $250.00 for any one accident or occurrence) in the Amount of $75,000.00.

(b) All insurance shall be effected with responsible underwriters satisfactory to the Owner, with Losses payable to OWNER.

(c) All insurance shall be taken out in the names of the Owner and the Charterer, as their interest may appear. All cover notes and policies shall be delivered to the OWNER before the Motor Vessel leaves its berth in the Port of New York.

(d) Any insurance against liability that may be collected by the Charterer shall be applied forthwith to the settlement of the liability on account of which the collection is made, or, if the Charterer has discharged such liability, to the reimbursement of the Charterer Therefor.

(e) So long as the Charterer is not in default hereunder, it shall be entitled to be reimbursed for the cost of repairing any damage or injury sustained by said Motor Vessel, out of the proceeds of any insurance collected on account of such damage or injury, provided such damage or injury shall have been fully repaired by the Charterer.

(f) The OWNER shall be entitled to all insurance money collected in case of the actual or constructive total loss of said Motor Vessel.

(g) The Charterer shall not suffer or permit any act to be done whereby any insurance is, or may be, suspended, impaired or defeated; but shall keep the aforesaid insurance valid at all times.

Respondents' Exhibit 7

15. Loss: (a) In the event of the actual or constructive or agreed total loss of said Motor Vessel for any reason whatsoever before delivery to the Charterer pursuant to the terms of this Charter Party, this Charter Party shall be void.

(b) In the event of the actual or constructive or agreed total loss of said Motor Vessel for any reason whatsoever at any time after delivery to the Charterer hereunder and before the expiration of this Charter Party, this Charter Party shall terminate, and the Charterer shall be reimbursed for any charter hire paid in advance. Charter hire to be figured on a pro-rata basis.

16. Default: If, at any time after the delivery of said Motor Vessel to the Charterer hereunder, the Charterer shall fail to perform any of its obligations herein assumed, or the Charterer shall be dissolved, or shall lose its corporate charter for any reason, or shall be adjudged a bankrupt or shall make a general assignment for the benefit of its creditors, or a receiver shall be appointed for the Charterer, then and in every such case the OWNER shall have the right to withdraw said Motor Vessel from the Charter Party and from the service of the Charterer and to retake possession of said Motor Vessel wherever the same may be found without prior demand on the Charterer and without legal process, and for that purpose may enter upon any dock, pier or other premises where the Motor Vessel may be found to take possession of the same, and the Charterer forthwith upon demand of the Owner shall surrender possession of said Motor Vessel; all without prejudice to any claims which the Owner may have under this Charter Party for any unpaid balance of charter hire of said Motor Vessel, that may be due, or for damages for breach of this Charter Party, and without prejudice to any

other claims which the Owner may have against the Charterer hereunder. The reasonable expenses of the Owner in retaking possession of the Motor Vessel, as provided in this Section 16, shall constitute a debt of the Charterer to the Owner and shall be payable on demand.

17. PERFORMANCE BOND: Performance Bond in the Amount of $50,000.00, shall be given the Owner by the Charterer for the faithful performance of all conditions of this Charter Party.

18. SUCCESSORS AND ASSIGNS: All the obligations in this Charter Party of the Owner and the Charterer respectively shall bind their respective successors and assigns whether so expressed or not.

IN WITNESS WHEREOF, the Sound Steamship Lines, Inc., party of the first part, has caused its corporate name to be hereunto affixed, and this instrument is to be signed and sealed by its President, and the ....., party of the second part, has caused its corporate name to be hereunto affixed, and this instrument is to be signed by its President, as of the day and year first above written.

SOUND STEAMSHIP LINES, INC.

WITNESS

..... By.....
President.

WITNESS

..... By.....
President.

Respondents' Exhibit 7

File No. V 63695

Official Number 127506

Data relating to stability of this vessel is on file in the office of Director, Bureau of Marine Inspection and Navigation, Washington, D. C.

1st Special Survey No. 3: 5-9-38

THIS CERTIFICATE EXPIRES JUNE 23, 1942.

UNITED STATES OF AMERICA

DEPARTMENT OF COMMERCE

Bureau of Marine Inspection and Navigation

CERTIFICATE OF INSPECTION FOR STEAM OR MOTOR VESSELS

1 Oiler and 5 persons when needed in steward's dept. If the hours of duty exceed 12 of any 24, 4 Able Seamen, 2 Seamen and 3 oilers are required. Included in the entire crew, there must be 2 certificated lifeboatmen.

State of New York
District of New York *Passenger Vessel* CALVERT

APPLICATION in writing having been made to the undersigned *Inspectors for this District*, to inspect the above-named vessel propelled by motor, of New York, in the State of New York whereof Sound Steamship Lines, Inc. owner, and Harry Bennett is Master, said inspectors, having completed the inspection of the vessel on the 23rd day of June, 1941, Do CERTIFY that the said vessel was built at Phila-

delphia, in the State of Pennsylvania, in the year 1901; rebuilt in the year 1 — ; that the Hull is constructed of steel & wood; and, as shown by official records, is of 545 gross tons; that the said vessel has — Staterooms and — Berths, and is allowed to carry 114 pasengers, viz.: — First cabin, — Second cabin, and — Deck or Steerage Passengers.

Included in the entire crew hereinafter specified and designated there must be 7 certificated lifeboatmen. From April 13 to November 15 inclusive, allowed to carry 1300 persons including passengers and crew on Long Island Sound between Peeks Lodge and New London, Conn., not more than 3 miles from land. From May 15 to October 15 inclusive, allowed to carry 445 persons; before and after said period, allowed to carry 154 persons on waters specified. Allowed to carry 1300 persons including passengers and crew on the Harbor of New York and tributaries. If the hours of duty do not exceed 13 of any 14, only the following licensed officers and crew are required: 1 Master & Pilot, 1 Pilot, 1 Inland Mate, 4 Able Seamen, 1 Seaman, 1 Chief Engineer, 1 First Asst. Engineer, 1 Oiler, 2 Watchmen, when navigating on rivers only, deckhands may be carried in lieu of able seamen and the certificated lifeboatmen dispensed with. When operating as a freight vessel on Bays, Sounds and Rivers route, if the hours of duty do not exceed 12 of any 24, the following crew is required: 1 Master & Pilot, 1 Pilot, 3 Able Seamen, 1 Seaman, 1 Chief Engr., also is required to carry a full complement of licensed officers and crew, consisting of — Master, 1 Master and Pilot, 1 Pilot, — Chief Mate, — Second Mate, — Third Mate, 1 Inland Mate, — Chief Mate and Pilot, — Second Mate and Pilot, — Third Mate and Pilot, — Inland Mate and Pilot, — Quartermaster, 4 Able Seamen, 2 Seamen, — Apprentices, — Deck Hand.

Respondents' Exhibit 7

1 Chief Engineer, 1 First Assistant Engineer, — Second Assistant Engineer, — Third Assistant Engineer, — Junior Engineer, — Water Tender, 2 Oilers, — Firemen, — Coal Passer, — Wiper, 2 Watchmen, and also 5 persons when needed in Steward's and other departments not connected with the navigation of the vessel; that the said vessel is provided with 1—8 Cylinder Diesel Engine of 15 inches diameter of cylinders and 1-7/12 feet stroke of piston, and — Boiler, — feet in length and — inches in diameter, made of lawful —, in the year 1 —, rebuilt in the year 1 — The said vessel is permitted to navigate, for one year the waters of the Bays, Sounds and Rivers between Sandy Hook, N. J. and Boston, Mass. via Long Island Sound and Cape Cod Canal, and touching at intermediate ports, a distance of about — miles and return.

We further certify that the said vessel at the date hereof is, in all things, in conformity with the laws governing the Bureau of Marine Inspection and Navigation and the Rules and Regulations of the Board of Supervising Inspectors.

The following particulars of inspection are enumerated, namely:

Anchors (number)	2
Cables (number)	2
Motor lifeboats (number)	—
Metal lifeboats (number)	2
Wooden lifeboats (number)	—
Working boat (number)	1

Respondents' Exhibit 7

Collapsible lifeboats (number)	—
Buoyant apparatus (number)	—
Life rafts (number)	5
Life preservers for adults (number)	1300
Life preservers for children (number)	130
Axes (number)	6
Auxiliary life-saving appliances:	
Ring buoys (number)	4
Luminous buoys (number)	2
Line-carrying gun and projectiles	—
Fire extinguishers (number)	9
Fire pumps (number)	3
Fire hose, total length of (feet)	300
Date when shaft was last drawn	—

Pressure Vessels: 6-21-41

MAIN BOILERS

This vessel is propelled by Diesel motor.

DONKEY OR AUXILIARY BOILERS

This vessel is propelled by Diesel motor.

WM. M. MCGUIRE, *Inspector of Hulls.*
HOWARD C. BRIDGES, *Inspector of Boilers.*

Respondents' Exhibit 1

State of New York
City & County of New York } ss.:

Subscribed and sworn to before me this 23rd day of June, 1941, by Wm. M. McGuire, Inspector of Hulls, and by Howard C. Bridges, Inspector of Boilers.

FRANCIS J. BARRY
Notary Public, N. Y. County

OFFICE OF U. S. LOCAL INSPECTORS,
DISTRICT OF (PORT) New York, N. Y., June 23, 1941.

WE HEREBY CERTIFY that the above certificate is a true copy of the original issued by this office to the vessel named herein.

WM. M. MCGUIRE, *Inspector of Hulls.*

HOWARD C. BRIDGES, *Inspector of Boilers.*

On vessels of over 25 gross tons, the original certificate must be framed under glass and posted in a conspicuous place in the vessel where it will be most likely to be observed by passengers and others. On vessels of not over 25 gross tons, the original certificate must be kept on board to be shown on demand. (*Section 4423, Revised Statutes.*)

Steam pleasure yachts are forbidden to carry merchandise or passengers for pay, unless upon change of character by the Inspectors of the Bureau of Marine Inspection and Navigation.

Clerk's Certificate

UNITED STATES DISTRICT COURT

District of New Jersey

Civil 649-53

[Same Title]

I, Michael Keller, Jr., Clerk of the United States District Court for the District of New Jersey, do hereby certify that the papers and exhibits transmitted herewith and enumerated below comprise the Record on Appeal in the above-entitled matter.

Docketed Papers

1. Libel and Complaint
2. Stipulation for Libellant's Costs
3. Notice of Attachment
4. Stipulation for Claimant's Costs
5. Notice of Appearance on behalf of Ernest E. Fuchs
6. Notice of Appearance on behalf of Sound Steamship Lines, Inc.
7. Claim of Owner
8. Exceptions of Sound Steamship Lines, Inc.
9. Monition and Citation with Marshal's return thereon
10. Notice of Motion for Hearing of exceptions
11. Affidavit of Publication
12. Letter-Opinion
13. Order for Release of Vessel, etc.
14. Order to Show Cause re Application for stay pending

appeal

15. Affidavit in Opposition to Motion to Stay Private Sale
16. Stipulation for value and costs
17. Answer of Second Steamship Lines, Inc.
18. Answer of Ernest E. Fuchs
19. Order Dismissing Order to Show Cause re application for stay
20. Copy of order for release of vessel with Marshal's return
21. Amended Notice to Take Deposition of Respondents
22. Answer to Interrogatories by Libellant
23. Order to Show Cause re vacating amended Notice to Take Deposition
24. Affidavit of Sidney M. Wittner
25. Resettled order dismissing order to show cause re stay
26. Notice of Appeal
27. Appeal Bond
28. Certified copy of order of U.S.C.A. denying motion to docket record out of time
29. Notice of Motion for Discovery and Inspection
30. Affidavit in Opposition to Motion for Discovery and Inspection
31. Notice of Motion to take deposition
32. Affidavit in Opposition to Motion to take deposition
33. Notice of Motion to direct libellant to comply with former order and complete his examination before trial

34. Consent Order for Discovery and Inspection
35. Transcript of pre-trial conference
36. Transcript of hearing on motion for discovery, etc.
37. Substitution of Attorney for libellant
38. Deposition of Martin J. Gross
39. Stipulation and Order extending time to file briefs
40. Deposition of Joseph F. Carroll, Jr.
41. Notice of Motion to direct production of certain records
42. Findings of Fact and Conclusions of Law
43. Amendment of Findings of Fact and Conclusions of Law
44. Order Denying Motion to Dismiss
45. Libellant's Notice of Motion for entry of judgment
46. Respondent's Notice of Motion for dismissal as to Ernest E. Fuchs and Sound Steamship Lines, Inc.
47. Notice of Motion for reargument and reconsideration of Opinion
48. Notice of Motion of S.S.S. Lines for relief similar to that in motion of Ernest E. Fuchs, etc.
49. Order and Judgment
50. Copy of order and Judgment with affidavit of service
51. Notice of Cross-Appeal by Libellant
52. Notice of Appeal of Ernest E. Fuchs and Sound Steamship Lines, Inc.
53. Appeal Bond
54. Order Denying Motions heard 11-26-56

Clerk's Certificate

55. Order to Re-Number and Re-Bind Transcript Pages of Trial Record

56. Order extending time to file and docket record on appeal

57. Transcript of Testimony (2 volumes)

58. Order denying motion for re-trial and motion for dismissal of libel nun pro tunc

Exhibits

P- 1 Trustee's Bill of Sale

P- 2 Letter re bid for chattels

R- 1 Charter Party on letterhead of Sound S.S. Lines

R- 2 Bill of Sale re vessel "Sandy Hook"

R- 3 Mortgage of Vessel "Sandy Hook"

R- 4 Mortgage of Vessel "Sandy Hook"

R- 5 Two Coast Guard Inspection Books

R- 7 Certificate of Inspection of the M/V "Calvert"

R-10 Bill of Sale of Enrolled Vessel

R-11 Photostat of Check

In Witness Whereof, I have ! ! ! ! !!!!my name and affixed the seal of said Court, ! !! ! ! !!District, this 15th day of February, 1967.

! ! ! !!!!!

By

! ! ! !!!!!

Deputy Clerk

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Testimony of Ernest E. Fuchs

Direct Examination by Mr. Dunham

Q. Yes. First I want to ask you if you are one of the respondents in this case. A. I am.

Q. And what do you have to do, if anything, with the Sound Steamship Lines? A. I am the president and operating manager.

Q. Now I want to ask you further, were those the conditions in 1951? A. Yes.

Q. As that is what we are interested in here, the year 1951. A. Yes, yes.

Q. Now in June 1951 where was the Calvert? We probably have it established but will you give the full address? A. She was in the Bethlehem Shipyard at Mariners Harbor, Staten Island, New York.

Q. Yes. Now what was the purpose of having her there? A. We sent her there to have a new Diesel engine installed.

Q. I see. Had you had one on her before? A. We had one on before but it had been removed and sold.

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Q. Now may I ask you, how did you get her from some place to the shipyard, Bethlehem, by towboat or how? A. We towed her.

Q. When you say "we", you didn't, did you? A. The Tice Towing Line towed her.

Q. That's what I wanted to get. A. Yes.

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Q. Now, what was the condition, what was the situation with respect to a crew when they towed her? A. We had nobody aboard.

Q. Nobody at all. A. No, sir.

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* Figures in parentheses refer to pages of the stenographer's minutes.

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Q. Well, may I ask you, do they put a man aboard? A. They put a man aboard, a deckhand aboard.

Q. And did you get to Bethlehem after she was tied up there? Did you help tie her up or anything? What was the condition? A. No, the shipyard men do that.

Q. Oh, they tied her up. Now at any time after that did you have any member of the crew aboard the ship, this ship, for the next ten or fifteen or twenty days? A. We didn't have any members of the crew. We had a painter there.

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Q. Now, while this ship was at Bethlehem did Mr. Gardner visit you? A. Yes, he did.

Q. Can you give us the approximate date? A. Well, it was some day early in June, I'd say around the 7th.

Q. That was in 1951. A. 1951.

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The Court: Just give us the conversation as well as you can remember it, the sense of it.

Q. Did he come up and say "Hello" and then you had the conversation? Was that it? A. He came there to ask me if I would charter—

The Court: No, he came there and asked you.

The Witness: Yes, yes.

A (Continuing)—and asked me if I would charter the Motor Vessel Calvert for the race track run that season, that the Sandy Hook would not come out.

Q. And what was your reply to that question? A. I said I certainly would be willing to charter the vessel under certain conditions.

Testimony of Ernest E. Fuchs, Direct

Q. And did you tell him the conditions? A. I told him the conditions.

Q. And what were they, Mr. Fuchs? A. Well, first, he was to supply the whole crew because I had nobody aboard the boat outside of a painter who was not a member of the crew. He would have to give me hull and machinery insurance, P. and I. insurance, a performance bond, take care of supplying all—

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The Court: Now let me get this. Hull and machinery insurance—

The Witness: Protection and indemnity insurance, a performance bond, and pay the cost of all operating expenses, such as fuel, victuals,—

Q. Lube oil? A. Lube oil, and everything incidental to the operation.

Q. Now let me go a step further— A. And I also told him—

Q. May I interrupt? This conversation, was this the first time or the second time? A. This was the first time.

Q. The first time. A. Yes.

Q. All right. You also told him what?

The Court: You also told him what?

A. And I also told him that I would not charter the boat to him, he would have to give me the name of the party who would charter the boat, to which he replied that the race track would be interested, as that was where the boat was going to run, for the duration of the racing season of 1951.

Q. Did you tell him you would not charter to him? Is that right? A. That's right.

Q. And you knew of Mr. Gardner, did you not? A. I did.

Testimony of Ernest F. Fuchs, Direct

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Q. You knew that the Hook was in bankruptcy, did you not? A. I knew she was in some legal procedure and there was rumors around the town—

Mr. Wittner: Now just a minute.

The Court: No, don't put in any rumors.

The Witness: All right. I knew that she was—

The Court: You knew she was in—

The Witness: In financial difficulties, and a friend of mine—

Mr. Wittner: Just a minute. I am going to object now to what he told you, a friend.

The Court: It is a fact that she was in the custody of the Court under Chapter XI proceedings.

Mr. Wittner: That's right.

The Court: That we know.

The Witness: Yes, sir.

Q. Now, did you know that he was president of this bankrupt? A. Yes, I did.

Mr. Wittner: Wait a minute. It wasn't bankrupt yet either.

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Mr. Dunham: Alleged bankrupt.

The Court: Oh, look!

Mr. Dunham: Alleged bankrupt.

Q. Now, was there any further conversation which you can tell his Honor about that took place at that time? A. Yes, he asked me if I would draw up a charter party, a bare boat charter party, showing the conditions under which I would charter the vessel to him.

Q. And what did you reply? A. I said I would go home that night and write it up myself.

Q. Did you? A. I did.

Q. How? A. On a typewriter, on stationery of the Sound Steamship Lines.

Q. Where? A. At my home.

The Court: A bare boat charter party?

The Witness: A bare boat charter party.

Q. Where did you do this typewriting? A. At my home in Bell Harbor.

Q. And you have a typewriter in your home, do you? A. I do.

Q. Now let's continue this first visit, if we may. Was there anything else said? Was anything further—let's finish

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our conversation before we offer the exhibit—was anything further said, Mr. Fuchs? A. Well, I told him that I would draw up—

The Court: Was the price agreed on?

The Witness: The price was agreed on, yes, your Honor.

Q. What was the price? A. Four hundred dollars per day.

Q. For how long? A. Twenty-eight days.

Q. And what can you say as to Sundays? Was there any discussion about Sundays? A. Sundays, he told me he didn't require the boat on Sundays because the race track was not open.

Q. I see. So there is no question but what it was understood that it was to be on the race track run. A. That's right.

Testimony of Ernest E. Fuchs, Direct

Q. Yes. And what if anything was said with respect to your vessel? Did you have it all equipped? Did you tell him that? What did you say if anything about the vessel? A. About the what?

Q. Did you have any chairs aboard? A. Nothing was mentioned about that at that date.

Q. Nothing. A. No.

Q. And nothing mentioned, I understand, is this true,

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about life preservers? A. Nothing was mentioned about life preservers that day.

Q. Now, where did this conversation take place? On the pier or on the ship, on the vessel? A. We started on the pier in my car, he was outside of my car and I was inside.

Q. Did he have a car? A. I don't recall whether he did or not.

Q. All right, go ahead, I am sorry to interrupt. A. And then he said he would like to go down to look over the boat; he had known of her but he wanted to go down and see what she looked like; he hadn't seen her in some time.

Q. Did he do that? A. So we went down together.

The Court: When? When was this?

The Witness: At the end of the first trip, June, about June 7, 1951.

Q. And did he do that? A. He did that.

The Court: Did you say he went with you?

The Witness: With me, yes, your Honor.

Q. All right. What was the situation? Was anybody with you and him at that time or were there just the two of you? A. Just the two of us.

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Q. Around the ship. Did he go on the deck? A. Oh, yes, he took a trip all around; he went down around the main deck, he went up around the salon deck, then he went up around the top deck, up on the boat deck.

Q. What if anything was being done with respect to the engine at that time? A. Well, this engine was being bolted down. They had already installed the new foundation and the engine was being bolted down, and lined up.

Q. Who do you mean by "they", Mr. Fuchs? A. The Bethlehem Shipyard employees.

Q. So the employees aboard were their employees and not yours, is that true? A. We had nobody aboard.

Q. Now on the ship, on the decks or wherever it was, did you have any further conversation with respect to this proposed chartering of the vessel, that you can think of now? A. No, I think I asked him, I am not sure now, I think I asked him if he was satisfied and he said "Well, she is about what I thought she was."

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The Court: What was her capacity? What was her capacity?

The Witness: She was allowed 1300 passengers—

The Court: There is no dispute about that. Mr. Gardner said the same thing.

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The Witness: Thirteen hundred included the crew.

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Q. I show you this Respondent's Exhibit. Is that the bareboat charter that you typed out for Mr. Fuchs? A. Yes.

Mr. Dunham: Now I offer that in evidence.

Mr. Wittner: Well, that's objected to. It is an unsigned document and—

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The Court: Well, did you show it to Mr. Gardner?

Mr. Dunham: Not at that time.

The Witness: Not on that date.

The Court: Withhold the offer, withhold the offer.

Mr. Dunham: Yes, I will withhold it.

Q. Now, may go on to some other date. Can you tell his Honor about when you had another talk with this man, if you did have one? A. About a week or ten days after, he came in the yard again.

Q. I see. And where were you when he came in? A. I was down on the boat.

Q. And did he greet you, say "Hello," or something. A. He came down and said "Hello." He said—

The Court: Just give us the conversation.

Q. What was the conversation?

The Court: Omitting the social amenities, if you please.

The Witness: Yes.

A. He wanted to know if I had drawn up the charter party, or the bare boat charter agreement.

Q. And what did you say? A. I told him I had, that I had it up in my car, in a briefcase in my car, and he said, "Suppose we go up and get it." I said "All right." We walked up and he sat in the car and I gave him the charter party.

Q. Did he look at it? A. He glanced at it and said "Well, this seems kind of long." He said "I'll take it home and read it thoroughly and give it back to you or come back again and talk to you later."

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Q. Now, you say you gave him—did you give him the original or the copy, do you recall? A. I don't recall. I think it may have been a copy.

Q. Yes. A. I think I would have retained the original.

Q. Now, was there any more conversation with respect to this bare boat charter? A. Only that I asked him again what was going to be the name of the charterer, who was actually going to sign the charter.

Q. Had you left that blank? A. I had left that blank on the—

Q. At his request? A. No, no; he says "Forget that for a while and I'll let you know the next time I come back."

Q. What about the dates? Did you insert any dates? A. Yes, I put dates in.

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Mr. Dunham: I will offer this, your Honor, in evidence.

Q. This is definitely the charter you showed him, is it? A. That's right.

The Court: Is this the—

The Witness: This is a copy of it or a photostatic copy. I don't know which.

Mr. Dunham: No, that's the original.

The Witness: Is that the original? I can't see. I didn't look at it to find out.

The Court: Well, look at it and see (handing to the witness).

The Witness: Yes, that's the original.

The Court: That's the original.

The Witness: Yes.

The Court: And you gave either that or a copy of it—

The Witness: Or a copy of it, yes.

The Court: To Mr. Gardner.

The Witness: To Mr. Gardner.

The Court: And he took it home.

The Witness: He said he was going to take it home.

The Court: He said he wanted to read it over.

The Witness: Yes.

The Court: All right. Now, then, did he return it to you?

The Witness: No, he did not.

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The Court: So that this is not the one you gave him.

The Witness: No.

The Court: It is a copy of it.

The Witness: It is a copy of it.

Mr. Wittner: I shall object to its being received in evidence. Obviously, and according to the witness he admits it, it is not the one he gave him, it is not signed, not a signed document; obviously it is not one agreed to by Mr. Gardner.

The Court: Well, the testimony is that he gave a copy of it to Gardner. Gardner says that he got no copy of it, and this witness testifies that this is the original a copy of which was given to Gardner. I will allow it.

The Clerk: This exhibit is now marked Respondent's 1 in evidence.

The Court: Neither of the copies was signed by anybody, is that right?

The Witness: No, your Honor.

The Court: All right.

Q. I know this speaks for itself but will you tell his Honor if the dates are left blank and why, if there was any reason. A. I didn't get that.

Mr. Wittner: Just a minute. I will object to explaining now something that's concededly not part of the discussion between him and Mr. Gardner.

The Court: I don't know whether it was or not. Let's find out.

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Mr. Wittner: Counsel asked him "Will you give the reason?"

The Court: Well, if the reason was because they discussed it, let's have that. If it wasn't that, I will know what to do with it.

A. What was the question?

Q. Will you explain it?

Mr. Dunham: Perhaps you will read the question.

Q. (Read by the Reporter).

A. Well, because, the first date was left blank because we didn't know what date it was going to be signed.

Q. And when you typewrote that contract did you put or attempt to put into it the provisions that you talked to Mr. Gardner about? A. Yes.

Q. Did you put in about the performance bond? A. I did.

Mr. Wittner: Well, now, the document speaks for itself, your Honor.

The Court: Well, I am just looking at it and the 17th paragraph says "Performance Bond."

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The Court: Well, if I can get a brief resume of what is contained in it it may be very fruitful and helpful and save my time in reading the thing over.

What are the general terms and conditions?

Q. Yes, just give us the—A. Well, the first would be that the owner agrees to charter and the charterer agrees to charter the vessel.

Q. What is next? A. For a certain length of time from a certain date.

The Court: Yes.

A. Then you go on—well, I can't give them to you numerically from here; I can't remember them, your Honor.

The Court: Give it to me.

Q. Was there anything about the price? A. Yes, the price was stated therein.

The Court: No exceptions, and then a reference to the expenses of operation, and the fact that the charterer shall accept and pay for all fuel and consumable stores belonging to the owner on board at the time of delivery, and that on re-delivery the owner will pay for what is then put on board—

The Witness: Yes, sir.

The Court: The charterer will have the use of all the equipment and appliances, which will be returned.

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Terms of financial payment.

An agreement that the charterer will remove such officers or members of the crew on written request of the owner at any time; and that the crew, all of the crew, will be the employees of the charterer only.

That the charterer must maintain it and repair it, and hold the owner free of all liens, charges, encumbrances, fines, penalties, and so forth.

That the charterer and master shan't have the right to create any liens.

That he will put in a conspicuous place the ownership.

That if there be any libel the charterer will notify the owner and put up a bond.

That he shall insure at his own expense hull, machinery, and so forth in the total of seventy-five thousand, P. & I. not over two hundred and fifty thousand, insurance to be satisfactory to the owner, taken out in the name of the owner and charterer as their interests appear. Provisions about the disposition of insurance paid.

Provision for retaking possession in the event of certain defaults.

A performance bond in the sum of $50,000 shall be given the owner by the charterer for the faithful performance of all conditions of this charter.

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And they bind their successors and assigns. Those are the pertinent provisions.

Q. Now, shall we go to the next meeting. When was your next meeting, if you can fix the date approximately? A. Around the end of June or the early part of July.

Q. And what took place at that meeting? A. I again asked Mr. Gardner if he was ready to give me the name of the charterer, if he was ready to have the charter party signed, if he was ready to put up the insurance, if he was ready to give me the performance bond—in fact, I asked him if he was ready to do everything that the charter party consisted of.

Q. And at that time did you ask him for money? A. I asked him for money.

Q. How much? A. Because it was understood that the full charter hire was $11,200.

Q. That was 28 days. A. Twenty-eight days at $400 per day.

Q. Well, now,—

The Court: That was for the full—

The Witness: —period of the charter hire.

The Court: You mean payment for the full period?

The Witness: Yes, sir; that was one of the conditions.

The Court: Why did you care who was the charterer if he was to pay for it ahead? What difference did it make?

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The Witness: Your Honor, a hundred thousand dollars worth of goods?

The Court: If it was paid down and you were insured—

The Witness: That's only the—

The Court: —and there was a performance bond, why were you hesitant about chartering it to Gardner?

The Witness: Because I didn't like the rumors I had heard.

The Court: Why did you deal with him at all then?

The Witness: I wanted to get some money out of the boat. I had just spent fifty thousand—

The Court: You didn't like the rumors about him.

The Witness: Well, if I can get a charter party under these conditions I can deal with anybody. I know I am protected. I don't want the boat—

The Court: You are protected by the insurance and so forth—

The Witness: And the performance bond.

The Court: And the performance bond?

The Witness: Yes, sir.

The Court: If that is so why did you insist that somebody else charter it than the man with whom you were dealing, when you were so well protected?

The Witness: I didn't like to deal with Mr. Gradner.

The Court: But you did deal with him.

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The Witness: No, I did not. These were all arrangements that were made—these were negotiations that we were talking about, he was representing some unknown charterer and we were just talking about the conditions so that he could refer them to the party that was going to sign the charter party.

The Court: I see.

Q. Did he mention the race track? A. He said the race track was interested.

Q. Did you talk to somebody from the race track? A. Not at this time, no.

Q. Now, afterward did you talk to anybody from the race track? A. Later on, yes.

Q. Did they come into it, into this transaction? A. No, they did not.

Mr. Wittner: Just a minute. That certainly calls for a conclusion. If he is going to talk to someone

he ought to name them. There is one witness from the track—

The Court: Well, they didn't come in; they didn't come into it.

Q. Now, I think we were talking about a meeting, a discussion arrangements before going to then the early part of July. A. That's right.

Q. And I think at that time you asked him for $11,200.

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A. That's right.

Q. Now do you recall—

Mr. Wittnor: I beg your pardon. He didn't say the early part of July; he fixed it at the end of June.

The Witness: I said late June or early July.

Mr. Wittner: He didn't say the end of June.

The Court: No, he said late June or early July. The end of June or early July is what he actually said.

Q. Had you asked him for the payment of the money before that, do you recall, the $11,200? A. Well, I asked him to pay me the money when he signed the charter; that's when it was due.

Q. Yes.

The Court: No, no, no. When did you say you wanted him to pay the money when the charter was signed?

The Witness: That was one of the conditions, your Honor.

Q. No, he means what time did you—

The Court: When did you—

Q. Pin it down.

The Court: When did you tell Gardner that you expected him to pay the full sum at the time of the signing of the charter?

The Witness: When I handed him this charter party.

The Court: All right.

The Witness: On July 2d or about—the latter part of June or—

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The Court: Was there a discussion—there evidently was some discussion about the race track.

The Witness: Yes, sir.

The Court: You thought they might be the charterer.

The Witness: That's right, yes, sir.

The Court: And you talked to them.

The Witness: Later on.

Q. As a matter of fact, Mr. Mermelstein called you, or did you call him? A. I called him at the request of Mr. Hill.

Q. Yes. Now may we continue with your discussion here in the last part of June or the early part of July. At that time what if anything was done about your cover notes or your performance bond? Was anything done at all by Gardner? A. I had received nothing at all; just promises.

Q. Now, was there any discussion at that time about getting any equipment? A. No.

Q. This was the third meeting, third talk. A. No.

Q. Nothing mentioned. Now we go to—was there any other thing that you want to tell his Honor about that was talked about at that meeting, that you can think of now?

Testimony of Ernest E. Fuchs, Direct

The Court: Try to think of everything that you said.

The Witness: I am trying to, yes, your Honor.

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The Court: And if anything occurs to you later, don't hesitate to tell us.

The Witness: All right.

A. At that time he said he again wanted to go down and look at the boat and we went down together and were down there maybe a half-hour or maybe an hour. He came back and said "Well, I have to go along. I'll let you know about the charter later on."

Q. And up to that time—

The Court: That was at this meeting at the end of June or early July.

The Witness: Yes, your Honor.

Q. Now, was there another meeting? and if so, about when? A. About the 5th or 6th.

Q. And what took place at that meeting? I particularly refer to your talk with him, that's the most important. What did you say and what did he say? A. Well, at that time the Coast Guard inspector, the United States Coast Guard inspector, had passed on all of the Calvert's life preservers that we had aboard of her, and when he got finished he told me the amount that he needed to complete the 1300, including the crew and the lifeboats.

Q. Yes.

The Court: Now, wait a minute. Let me have this. This was on July 5th or 6th?

The Witness: 5th or 6th.

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The Court: What happened then?

The Witness: The Coast Guard had finished inspecting the Calvert's own life preservers.

Q. Did they inspect other things, too, other gear and equipment? A. Oh yes.

Q. Yes. A. Well, he is talking about life preservers.

The Court: No, they finished inspecting the boat?

The Witness: He was inspecting the boat, yes, your Honor. And—

Q. Had they had this—

Mr. Wittner: He started to say something—

Mr. Dunham: All right.

Mr. Wittner: —and you are not letting him finish his answer.

Q. Go ahead. A. And when he was finished with the life preservers we counted them and he told me how many we would need; and when Mr. Gardner came down I told him; I said "Now we haven't anything here. I have spent over $50,000 putting this boat in shape. I am not going to spend any more money until you do something to prove to me that you are going to safely perform the contract."

Q. And what did you mean by that? A. Sign the charter, give me the money, give me the insurance policies

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and put up a performace bond. If he couldn't put up the insurance policies, to at least give me a cover note so that I would know that the boat was insured or would be insured.

Q. And what did he say about that? A. He said, "Well, as to life preservers," he said, "I'll take it up with somebody at the race track" or somebody in connection with the assets of the defunct company or company that—the Sandy

Hook anyway; and he said "I think I'll be able to borrow those for the duration of this charter, it's only 28 days, and I think I will be able to borrow them until the charter ends" or this date.

Q. Now,— A. And he said "But I can't promise you that I can get them but I will ask the parties and let you know."

Q. It it true that he volunteered to get them?

Mr. Wittner: Please; don't summarize your witness' testimony.

The Court: No, he has testified, he has told what he said.

Q. All right. Now at that time did he say "I will sell them," or did you say "I will buy them"?

Mr. Wittner: Now, please, I still object to that. I think the witness is capable of testifying. Let him testify.

The Court: Well, he must be asked a question before he can testify. Now the question is in the alternative.

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What was said about these—

The Witness: He said—

The Court: You have already—

The Witness: That's all there was to it.

The Court: You have already told it but tell it again because neither counsel seems to understand what you are talking about. I think I do.

The Witness: I think you do too, your Honor.

The Court: Go ahead. Go ahead.

The Witness: He said that he would take it up with some responsible person in connection with the Sandy Hook—who was connected with the Sandy

Hook—and get permission to borrow these life preservers for the duration of the charter hire, the charter party.

The Court: That's what you said before.

The Witness: And he would let me know later.

The Court: Now was that the sole discussion about the life preservers?

The Witness: That was the sole discussion about the life preservers; yes, your Honor I told him how many we needed from the figures that the United States Coast Guard inspector had given me.

Q. Now, do you recall about what time of day that was? A. Oh, I think it was around between 2 and 3 in the afternoon.

Q. Is this the day that he went on down to the track, do

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you know? A. Yes, that is the day, that is the day he went down to the track, because he said he was going down to the track to try to find out—get some permission to move his goods, these goods or life preservers from the—

Q. I mean did he tell you afterwards that he did go to the track? Did he call you from there or any place? A. He called me later that night at home.

Q. Did he say he was at the track? A. He didn't say where he was. He said—he called me at the hotel, not at my home—I had left my home then, we had closed, because I was going to go East; and he called me at the hotel and said he had permission to bring the boats down.

Q. When did you close your home? A. I closed my home on June 20th.

Q. And to what hotel did you go? A. Morris Hotel in Rockaway Beach, Rockaway Park, New York.

Q. How many days did you stay there? A. Three weeks and two days.

Q. Was your wife with you? A. She was.

Q. And later on we will produce—

The Court: I am very happy to see that you are a good family man but I don't see what that has to do with this particular situation.

Mr. Dunham: Well, she is here; she will testify.

(549)

The Court: All right, all right. But I don't care whether he was down there or not. Just confine yourself to this issue, please.

Mr. Dunham: It is very important, your Honor.

The Court: You said that three times about things and you haven't yet been able to answer any question as to why it is important. I ask you why it is important to show that he was down at this hotel with his wife for three weeks.

Mr. Dunham: Well, he went to the hotel, your Honor, and stayed there three weeks—was that it?

The Court: Yes?

The Witness: Three weeks—

Mr. Dunham: Then he checked out of there and went to Block Island.

The Court: Yes?

Mr. Dunham: And I will show your Honor later on why that is important but I have to show you this hotel first.

The Court: Well, can't you tell me beforehand why it is important so I can save time if I don't think it is important?

Mr. Dunham: Well,—

The Court: I am not taking your word for it and I am not taking the other counsel's word for what he thinks is important. I want to know why you think it is important and then I will tell you whether I think it is important.

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Mr. Dunham: Well, to show your Honor the exact date when he was not at Perth Amboy.

The Court: All right.

Q. Now we were talking about this other date, July, the early part— A. Life preservers.

Q. Yes. A. On July the 5th.

Q. Was there anything else in the conversation that his Honor has to have to decide this case, anything else about the— A. He asked me when I thought we should have the life preservers and I said that the Coast Guard inspector would be there the following Monday.

Q. All right. Now will you please go on to the next day and tell his Honor what happened and what is important in connection with these arrangements? A. Well, it was the same old story.

Q. What was the next date, can you tell us? A. The next date?

Q. Yes. I think you said he called you at the hotel. A. He called me on the night of the 5th.

Q. I see. A. And said that he had permission to move these life preservers and he asked me when I wanted them and I said we should have them for the Coast Guard inspector coming Monday.

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Q. Yes. Did he come down to the boat and tell you that or did he call you on the phone? A. He called me on the phone. Did who call me?

Q. Did Mr. Gardner call you on the phone? A. Mr. Gardner called me July 5th at the hotel.

Q. Yes. So then pursuant to that information and notice did you proceed to go back to the boat for any other purpose? A. Well, I was there always, I always went back to the boat to see how the work was progressing.

Q. Every day. A. Every day.

Q. Now let me ask you: Were there Bethlehem men on all the time, working? A. Yes, up until then they were working every day.

Q. By the way, when did they get through? About. A. They finished, the Bethlehem men finished on Monday July 9th.

Q. July 9th. Now,— A. According to my recollection.

Q. Yes. Now the 5th was on Thursday that year, wasn't it? Do you recall? The 5th of July? A. Well, the 2d was Monday, Tuesday, Wednesday—Friday, I'd say.

Q. On Friday. A. Monday was the 2d.

Q. Yes; Tuesday was the 3d, Wednesday was— A. The 4th.

Q. —the 4th and— A. Thursday the 5th.

Q. Thursday the 5th. A. That's right.

Q. So there was a transaction on Thursday. The reason I asked was because there was sometime—was it Sunday when the gear was put aboard? A. Sunday.

Q. Sunday. A. Sunday, yes.

Q. Yes. So that would be the 8th. A. The 8th; that's right.

Q. Now on the 6th or 7th did you have a conversation with Mr. Gardner? Did you talk with him? Did he come down to the boat, do you recall? A. I don't recall him coming down until Sunday.

Q. Then it is true that you were down there on your boat and the Bethlehem men were on board working away? A. On which day?

Q. On the 6th and 7th? A. Yes.

Q. You see, I would like to take everything chronologically, step by step. And then on the Saturday—on the Saturday—did you have a talk with him, or did you have a talk with Captain Jenks on the Saturday? A. Now which

one? July—?

Q. That would be this date, the Saturday. A. No, no, Captain Jenks wasn't there.

Q. On the 7th did you talk with Gardner? Was he down to the boat? Do you recall? A. I don't recall whether he was down on the 7th or not.

Q. You see, this is the day before the gear was put there. A. That's right. I don't recall.

Q. You don't recall. A. The next I recall him coming down, he came down with the gear.

Q. That was on a Sunday. A. That was on a Sunday.

Q. I see. I assume that day the Bethlehem men were not working, is that right? A. Sunday they were not working.

Q. Now will you tell his Honor what transpired with respect to putting the gear aboard? A. Well, the Sunshine came alongside the Calvert, somewhere 2 or 3 o'clock in the afternoon, and she was loaded solid with life preservers. They had two or three or four men that came up on her who had, they told me, loaded them from the Sandy Hook, and they started putting them aboard the Calvert, and they said "Where do you want them?" and I said "It isn't where I want them but if you'll pile them so the inspector can count them, please pile them 10 high." And they piled them 10 high.

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And then, if I recall correctly, there was nothing on that trip but the life preservers. There were so many of them that, she was a small boat, she couldn't carry hardly anything else; in fact, they were sitting and lying on them, the deckhands were on the life preservers when she pulled in. And I think it was Captain Jenks brought her in and he assigned the men to remove them from the Sunshine to the Calvert. A couple of the men were inside and a couple of men were outside passing them through the window—

we have open windows on the side—they were passing them in there and they were piling them up close to the window.

Q. Was that the first day that Jenks came aboard? A. That was the first day I saw Captain Jenks.

Q. Up to that time had there been any discussion about the price of this material, that you had agreed to pay or that he had agreed to sell? A. Definitely not.

Q. No discussion of buying or selling. A. No, because they were being loaned to us.

Q. Now on that particular day was there any discussion about price, when they put them aboard? A. Definitely not.

Q. He testified here with respect to some price for old chairs and new chairs and all that. A. Definitely not.

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Q. No discussion—

The Court: Let me ask you: You say that your recollection is that on this trip when the Sunshine first came to the Calvert, that you say only life preservers placed on board.

The Witness: Yes, your Honor.

The Court: Was there any other gear at all?

The Witness: Not that I recall on that first trip.

The Court: All right.

Q. Now, did the Sunshine make a second trip that day, do you know? A. I don't think she made a second trip that day because I don't see how she could get back in time—

The Court: Well, never mind how she—

The Witness: No.

The Court: Do you recollect that she did it?

The Witness: I don't recollect her doing it.

The Court: Did she make a second trip any time?

The Witness: Yes, the next day.

The Court: The next day. All right.

Q. That would be on Monday the 9th. A. That's right.

Q. Yes. Now, were you there when she came up to the Calvert and when Jenks came aboard? A. I was.

Q. Now can you tell his Honor what came aboard? A. Well, there was a load of chairs and a few buckets of paint, half-full.

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Q. About how many buckets? A. Oh, maybe one or two 5-gallon cans and three or four 1-gallon cans, and in those was some oil and old paint brushes.

Q. Did you have any paint aboard before that? A. Yes, I did.

Q. How much? A. I had only bought 30 gallons on the 6th that were delivered to the Calvert.

Q. Now tell his Honor what else you saw, as you say now, on that second trip. A. Well, there was a couple of ——there was a settee, I imagine it was aluminum army sna like a cretonne cover on it.

Q. For the ladies' room? A. I don't know what he was going to use it for. I mean I—I presumed he was going to use it some place.

The Court: Never mind that; never mind what you presumed. There was a settee there.

The Witness: A settee and a chair.

Q. Did you ask for it? A. I did not. And the gangplank was on her.

Q. What was that like? A. Well, that was a gangplank about 15, 18 foot long, 6 or 7 foot wide, made of

aluminum; it had a large wooden roller on one end and a prow on the other end.

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Q. Any handrails? A. No, the handrails did not come. There was a place— there were sockets there for the handrails to go in but the handrails were not there.

Q. Aluminum? Aluminum, was it? A. The plank was aluminum with a corrugated rubber surface so that the people wouldn't slip.

Q. On the steps. A. No steps; just a plank.

Q. Oh, just a plank. And what was the color? A. Aluminum, and the rubber was black.

Q. And did it have "Sandy Hook" on it? A. I didn't see "Sandy Hook" on it.

Q. I see. And did you offer to pay— did you agree to pay seven fifty for it? A. I did not. I wasn't interested in it.

Q. Did you see any lines come aboard? A. Yes, there was an old— old 8- or 9-inch line came aboard; oh, maybe 20, 30 foot long, that I noticed.

Q. And was it— an old line, you said? A. On old line, yes. In fact, it had been pulled apart. It was all shaggy on one end.

Q. Did you ask for that line? A. I did not. I couldn't use that line. It was too large for our boat.

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Q. Now did you see any of the tools or the equipment which Mr. Gardner mentioned here that belonged to him, I guess, some sort of working tools? A. No; no, I didn't.

Q. You were right there on the deck, weren't you, when it came aboard? A. I was right there all the time.

Q. And can you tell his Honor anything else that you saw come aboard? A. Yes; there was a dispenser, a broken

dispenser, for the ladies' room and there was a— it looked like a wooden soap barrel with some frying pans and a few little things like that in it.

Q. Tell me, did any of this gear have "Sandy Hook" on it? A. Only the life preservers, that I recall.

Q. I see. Now did you assist in stenciling those life preservers? A. I did not.

Q. What was the situation with respect to stenciling the word "Calvert" on the life preservers? A. Well, they had to erase, not erase but—

The Court: No, no, did you participate in that?

The Witness: I said no, your Honor.

The Court: You didn't participate in any of the stenciling?

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The Witness: No, your Honor.

The Court: Did you see them stencil?

The Witness: I saw them stencil.

The Court: All right.

Q. Do you know where they got the stencil from? A. The boatswain came down, he said he was the boatswain, I think his name was Golday—somebody mentioned stencils and he said "I found them in the boatswain's locker. I have them here."

Q. He said that? A. He said that.

Q. And did he bring the stencils down? A. He brought the stencils there.

Q. Were they Calvert stencils? A. Calvert.

Q. You have always had Calvert stencils aboard the boat? A. Aboard the Calvert.

Q. Yes. A. Yes.

Q. Now about how long did it take these men to stencil those, if you know? A. Oh, I don't know. I didn't stay

until they finished them, but it must have taken hours, because they had to—first they had to black out "Sandy Hook" and they had to put the name "Calvert" on it, after they had blacked them out.

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Q. I see. Now I believe you have told his Honor everything that you saw that you can think of now, right, that you saw came aboard? A. Well, let me see.

Q. You have mentioned the chairs, the life preservers, the gangplank, and the settee. Anything else? A. Well, I spoke about the dispenser for the ladies' room.

Q. All right. Now this was on Monday, wasn't it? It was on the 9th, on Monday. A. The second trip.

Q. Yes. A. Yes.

Q. And can you tell how many deckhands did he have, if you recall? A. I think there were about three or four.

Q. Did you see an oiler? A. No, I did not.

Q. Did you see an engineer? A. I did not.

Q. At any time did you tell him that you would put an engineer aboard? A. I did not.

Q. Did you have an engineer? A. I did not.

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Q. Now we go to the 10th. That was on a Tuesday. A. That's right.

Q. Yes. What can you say as to the Coast Guard inspection or this test of the davit? What about that? What day was that, if you recall? A. That was on the 9th.

Q. That was on the Monday. A. That was on the Monday, yes.

Q. Was that after the gear came aboard? A. No, I think it was—yes, it must have been after the gear came aboard because the men were there to lower the boat.

Q. That's right. Now we are coming up to this inspection, some kind of inspection—what do you call it?

The Court: Now wait a minute. Let me ask you—

Mr. Dunham: Yes.

The Court: You said before that there had been an inspection by the Coast Guard before the life preservers were brought on board.

The Witness: I said the Coast Guard, your Honor, I said the Coast Guard inspected the Calvert's life preservers.

The Court: Yes.

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The Witness: Before these—

The Court: There had been an inspection before these life preservers came aboard. If you will listen to my question we will get along. There had been an inspection of the Calvert before these life preservers of Gardner's were brought aboard, and as I recall it, the inspector said there were not enough—

The Witness: Life preservers.

The Court: —life preservers. Now was there any other inspection made by the Coast Guard at that time, before—

The Witness: Oh, yes, your Honor. This inspection had been going on over a month, because there was about ten or fifteen thousand dollars' worth of hull work that was done, new plates put in, frames.

The Court: All right.

The Witness: And they had to build a house around the new engine and all that had to be installed after the engine was dropped down.

The Court: And the Coast Guard had inspected that.

The Witness: Oh, they had to.

The Court: All right.

The Witness You have to submit blueprints—

The Court: I don't know whether they do or not. I am simply asking you whether they did or not.

The Witness: Yes; yes.

The Court: All right.

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Q. Is it true that they come aboard occasionally and check up on that? A. When they finish a day they ask you when you want them back again.

Q. That's right. A. You tell them the next day or two or three days and then they call the office, and they are assigned, they can't come themselves, they get assigned from the main office; they call up and say, "Fuchs wants me on the Calvert tomorrow" or the next day; the office says yes or no. "Is it important?" If it is important they will go right back the next day. If it can delay, if we have got another job, we put them on the other job.

Q. Yes. Now while we are talking about that, was there an inspection of that engine when it was finished, by the Coast Guard? A. Yes.

Q. And who was the inspector, do you recall? A. Yes, Mr. Olsen.

Q. Did you see him down there? A. I certainly did.

Q. Did he pass the engine? A. He passed the engine.

Mr. Wittner: There is no question raised about the engine.

Testimony of Ernest E. Fuchs, Direct

Q. Well, there was one thing yesterday, after the man from Ingersoll-Rand got off I realized I didn't ask him (564)
if the engine worked all right, after he made the change.

The Court: I am not—

Mr. Dunham: I want to show that, your Honor.

The Court: I am not concerned about that.

Mr. Dunham: Well, I will drop it.

The Court: There is no question raised about that.

Mr. Dunham: I will drop it.

Q. Now this periodic inspection or checking by the Coast Guard, that goes on every two or three days, approximately, is that true? A. That's true. Whenever you want them there.

Q. Yes. A. If you have something ready for him he comes and he does it and tells you what to do if he is not satisfied.

Q. Yes. Now bringing us up to the 9th, was there an inspector around there on the 9th, the afternoon? Was he aboard? A. He came aboard to pass on these life preservers that were brought over on the Sunshine.

Q. Yes. And what about testing some— A. And while they were testing them he mentioned something about lowering the boats so he could test the strength of the davits, the blocks, the falls,—

The Court: That was on the 9th.

The Witness: On the 9th, yes, sir.

Q. Now will you tell his Honor, is that what you call a (565)
boat drill? A. No.

Q. It's a testing. A. That's a testing of equipment.

Q. A testing of equipment. A. Of the boat equipment.

Q. Yes, that's a testing of equipment. A. That's right.

Q. Now with regard to a davit, what happened? A. Well, they didn't have—we didn't have—enough men there, or there weren't enough men, I'll say, to fill the boat; the boat called for 19 men and there weren't 19 men there; so as an alternative the inspector will allow you to fill the boat up with water.

Q. Now you are speaking of the lifeboat? A. I am talking about the lifeboat.

Q. That's these boats you put over the side in case of catastrophe? A. That's right.

Q. So the passengers can get off? A. That's right.

Q. Yes. Go ahead, please. A. So he lowered the boat down to within a foot of the dock because it was on the inshore side—he didn't take the water side, he took the inshore side, and lowered it down to the dock and he says

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"How about putting your men in?"

I said "Well, there are not enough men here, Captain."

He says "Well, then, let's fill it with water."

And we got the shipyard to hook up a hose and put in the equivalent in weight in water that they figure 19 men would weigh, which would be between a hundred and fifty and a hundred and sixty pounds apiece; that's the average they use.

Q. And then what happened? A. So they started to put the water in and he went away and when he came back the boat had been filled up with water—I think he telephoned the office, his office, or something; and the boat had been practically filled up with water when one davit, the forward davit, on the port side bent.

Q. Was there enough water in there for the drill? A. Oh, there was too much water in there for the drill.

Q. I see. A. She had withstood what she was supposed to and then nobody was watching it, I don't know, it wasn't anybody's particular fault, it just happened, that's all.

Q. I see. A. The davit bent.

Q. Now how quickly, if that was repaired, how quickly could you get that done? A. They worked on it all night. It was ready the next day.

Q. Who is "they"? A. The Bethlehem shipyard,

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worked on it all night, and it was finished the next day.

Q. That would be on the 10th. A. On the 10th.

Q. Now, when this equipment—what do you call it, test of equipment? A. Test of lifeboat equipment.

Q. Yes. Now when that transpired what did Captain Jenks do, if anything? A. Well, if I recall, he told the men to lower the boat as the inspector requested.

Q. Now in that particular drill are there any whistles blown or anything like that? A. No.

Q. That's a quiet drill, is it? A. No, that's just to test the equipment, strength of the equipment.

Q. Now did he test the other boat, lifeboat, do you know? A. No, he didn't test the other lifeboat.

Q. And was that going to be left until— A. That was going to be left until this was finished and then they were going to test both of them.

Q. I see. Now was there anything else on the 9th that took place, besides putting this aboard and testing this boat? Was there anything else— A. I didn't get that.

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Q. Well, on the 9th was there anything else that took place besides the Coast Guard fellow testing this davit or the boat and putting the gear aboard?

Mr. Wittner: Wait a minute.

Q. The rest of the gear? A. You say at night? They didn't—

The Court: Any time that day.

Q. Any time during the day; was there anything else done? A. The only thing I recall is that Captain Jenks mentioned the fact that they should have a watchman aboard and he was going to have a man stay on all night to sleep in one of the rooms.

Q. Now on Sunday and Monday, these two days that I am talking about, what if anything was said by you or Mr. Gardner about the $11,200, or by Captain Jenks?

Mr. Wittner: What's that? Is this the talk—

The Court: With reference to what?

Mr. Dunham: The payment of the $11,200. Say Friday, Saturday and Sunday. It's in the record.

Mr. Wittner: Well, I shall object to that because Mr. Gardner is the principal. There is no foundation laid for any question to—

The Court: No, I think that probably you ought to confine your question to discussion between Mr. Gardner and Mr. Fuchs.

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Mr. Dunham: Well, let's get that first, your Honor. Jenks was his alter ego. He was—

The Court: No, no; there is no evidence that Jenks was his alter ego at all. The evidence here is that Jenks was brought there as a possible future master; not that he was his alter ego or his agent or anything else. There is no evidence of that kind at all.

The Witness: May I say a word, your Honor?

The Court: If it is along the line of discussion with Mr. Gardner, yes.

The Witness: Well, it is about—

The Court: Or a discussion with somebody else in Gardner's presence.

The Witness: Well, it wasn't about money. I didn't mean that.

The Court: Well, with whom was the discussion?

The Witness: With Captain Jenks.

The Court: I don't care to hear it.

The Witness: Well, I'll say it was with Mr. Gardner.

The Court: Well, now, which was it?

The Witness: Well, it concerns the both of them.

The Court: No, no. Which was it with?

The Witness: Mr. Gardner.

The Court: Your discussion was with Mr. Gardner.

The Witness: Yes, sir.

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Mr. Dunham: May I ask him—

The Court: No, no; will you please not interrupt me?

Mr. Dunham: No, I am not. I don't want to interrupt you.

The Court: Why did you say Captain Jenks then?

The Witness: Well, because he was involved in it.

The Court: Was the discussion with Captain Jenks?

The Witness: No, with Mr. Gardner.

The Court: About what?

The Witness: About Captain Jenks.

The Court: I don't care to hear it. Go ahead.

Q. Now on Friday—we are talking about Friday, Saturday and Sunday, whether or not there was any discussion about money, about the $11,200.

Mr. Wittner: With whom?

Mr. Dunham: With Mr. Gardner. We are leaving Jenks out now.

The Court: With Mr. Gardner.

Mr. Dunham: Yes.

Mr. Wittner: Friday or Saturday?

Mr. Dunham: Or Sunday.

The Court: Friday, Saturday or Sunday.

Q. Did you have any telephone talk, or did he come to see you? A. When he came down with the boat on Sunday

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with the life preservers again I asked him if he was going to go through with the charter and was he going to pay anything and was he going to sign the charter party.

Q. Did you have any conversation about a certified check, with Gardner? A. Well, I don't konw which day. Yes, I did. I think it was Friday.

Q. What was it? A. Friday he called, I was talking—he called me on the phone and I spoke to him about payment of the charter and he said "I have $7500 in the bank." He said "I expect to have the balance Monday. I'll bring it all over." And he said "You wouldn't take a certified check, would you?—You won't take anything but a certified check, will you?" and I said "Yes." He seemed surprise and he said "What will you take?" I said "I'll take cash."

Q. This was on Friday? A. This was on a Friday.

Q. Can you tell his Honor about—was it a telephone call? A. A telephone call, yes.

Q. Can you tell his Honor about what time it was, please? A. It was in the evening because I wasn't home until the evening.

The Court: When did he tell you he expected to have the whole amount?

The Witness: Monday, the 9th. He said he was coming over Monday the 9th with it.

(572)

Q. Now, tell us this: On Tuesday, on Tuesday, we are going on to Tuesday, that was the 10th—right? A. Yes.

Q. That was the 10th. What conversation did you have with Mr. Gardner then? A. Mr Gardner came down on the boat in the afternoon and I again asked him, is he going to pay the money, is he going to sign, is he going to give me the insurance, what's going to happen. I said "I'm sick and tired of this stalling around; either pay up or shut up, and let's get this thing over, because I have two boats running down Block Island and I want to get there."

Well, one word followed another and there was a little hot talk going on and finally I said "All right you'd better get your men and your equipment off the boat if you don't intend to go through with it," and he went off.

Q. Now without intending to offend this lady can you give us some idea of that hot talk?

The Court: Oh, what difference does it make? What difference does it make?

Mr. Dunham: Well, I think it had a lot to do with this, when a business man with a proposed contract comes in an he starts accusing him with something—

The Court: Who started the language?

The Witness: I don't recall, your Honor.

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The Court: You don't recall.

The Witness: I don't recall.

The Court: It was an exchange.

The Witness: It was an exchange—

The Court: —of what we might call pleasantries.

The Witness: Lovely pleasantries.

The Court: You told him, in any event, to put up or shut up as you were sick and tired—

The Witness: Of his stalling.

The Court: —of his stalling.

The Witness: Yes, your Honor.

Q. Now on Monday the 9th did he bring down the $11,200? A. He didn't show up but he had telephoned Captain Jenks.

Q. Yes. A. And—

Mr. Wittner: Just a minute. That is obviously something this witness was not a party to.

The Court: No, he is not going to say anything further now. He wasn't there on the 9th. He was there on the 10th, and then you asked him about the insurance and all the other details and you said "Now what is going to happen?" and you said "Put up or shut up because I'm tired of stalling." Then you told him to—

The Witness: "Get your men and equipment off the boat because I'm going to tow her" the following day.

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Q. Now what did the shipyard have to do with that, if anything? Were you at their pier? A. Well, the shipyard were after me to move the ship. In fact, they kept asking me—

Mr. Wittner: I'll object to conversations with the shipyard.

Q. Well, didn't you tell that to Mr. Gardner, that the shipyard wanted you out of there?

Mr. Wittner: Well, now, that's a clear suggestion to overcome the objection.

The Court: Was there any discussion with Gardner about whether you had to move the boat or not?

The Witness: No, your Honor.

Q. Now, what had transpired on—

The Court: At that time, excuse me, at that time, on Tuesday, July 10th, when you told him to get his men off the boat, was there any indication of what you intended to do about the charter? Anything you told Gardner, except to get his men off the boat?

The Witness: I thought I was going to tie the boat up.

The Court: You were going to tie the boat up.

The Witness: At her lay-up berth at Perth Amboy, New Jersey.

Q. Well, at that conversation, that morning, that's what the Judge wanted to know, did you mention this charter agreement at all? was that brought into the conversation, or the insurance or anything? A. Yes.

The Court: He has already said that he asked him what he was going to do about the insurance and all the other details, and he said he should put up or shut up, that he was tired of stalling.

Now what was Gardner's reply to that?

The Witness: That's when the argument started.

The Court: Well, what did Gardner say?

The Witness: Well, he says "You're the second SOB that I have had dealings with in New York, Johnnie Mascuk and you," and he said "I'm sick and tired of it." He said "I'll get off the boat but you're leaving yourself open for a lawsuit."

I said "I'm sorry but I have to go down East. You won't fulfill your agreement and I have to call a halt some place or I'll be here all summer."

Q. At that time did he have any cover notes to put in your hand or show you? A. He did not.

Q. Did he have a hull policy to show you? A. He did not.

Q. Did he have $11,200? A. He didn't show it to me, no.

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Q. Now at one time, was there one time when he told you he had five thousand cash in his pocket? A. Yes, this was the 9th; he said he had $5,000 cash in his pocket.

Q. That was on the 9th. A. That was this afternoon of the 11th, rather; the 10th, the 10th.

Q. Did he have any performance bond there? A. He did not.

Q. And did he sign the contract? A. He did not. He nor anybody else.

The Court: Well, what I would like to find out now is just what happened, what was said by you and and him which terminate the discussion concerning the Calvert.

The Witness: I asked him if he was going to go through with it, your Honor.

The Court: And what did he say?

The Witness: He said "I'm prepared to give you $5,000 if you'll take that," and I says "No, I definitely will not; the contract calls for full payment, $11,200. That's one of the conditions of the contract and I insist on carrying on the contract."

Q. Now did Mr. Mermelstein or Mr. Hill try to get you to take less?

Mr. Wittner: Just a minute. In the first place, that certainly is an improper question.

The Court: Did anyone come —

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Mr. Wittner: Mr. Mermelstein, we had him here but he is talking now about Mr. Hill.

The Court: Did anyone come to see you later?

The Witness: Mr. Hill called me up at my home and he said—

Mr. Wittner: Just a minute. I object to a discussion with Mr. Hill.

The Witness: I am answering the Judge.

The Court: Are you objecting to my question? If you are, object to it.

Mr. Wittner: Well—

The Court: Say yes, if you are.

Mr. Wittner: I am sorry.

The Court: My question was, "Did any one come to see you in behalf of Mr. Gardner?"

Mr. Wittner: Oh, I have no objection to that.

The Court: All right.

Mr. Wittner: But he is now giving a conversation with somebody—

The Court: He said Mr. Hill, Mr. Hill.

Mr. Wittner: Mr. Hill.

The Court: Isn't that the man who was on the stand?

Mr. Wittner: No, sir.

(578)

Mr. Dunham: No, your Honor.

The Court: Mr. Hill telephoned you?

The Witness: Yes, sir.

The Court: All right.

The Witness: He was supposed to be—

The Court: All right, don't say what he said.

Q. And pursuant to that conversation what did you do, if anything? A. I called up Mr. Mermelstein at the race

track—or I called up at a number Mr. Hill gave, I don't know if it was the race track or his home or any office, but I called him up and I said then that Mr. Hill had phoned me the night before and told me—

The Court: Don't tell what he said.

The Witness: Don't tell what he said?

The Court: No.

Q. Now pursuant to that conversation with Mr. Mermelstein—when was that? on the 9th, you said. A. I am not exactly—I am not sure of the date.

Q. Around that week end?

Mr. Wittner: If your Honor please, I want to be fair about it. Mr. Mermelstein did testify so I suppose with regard to him he probably may testify but not with regard to somebody who wasn't here and we don't know.

The Court: Was your discussion with Mermelstein about the charter?

(579)

The Witness: Yes, your Honor.

The Court: What was your discussion with him about the charter?

The Witness: Well, I was shut off when I started to tell your Honor.

The Court: Well, I am asking you now. You can tell me.

The Witness: Yes, sir. Mr. Hill called me the night before—

The Court: All right, all right; then you got in touch with Mermelstein.

The Witness: Then I got in touch with Mr. Mermelstein.

The Court: And what was your discussion with Mermelstein?

The Witness: And I said Mr. Hill told me—

The Court: No, don't say what Mr. Hill told you; just the—

The Witness: I told him that it was my understanding that Mr. Mermelstein or the race track guaranteed the conditions of the charter and would sign the charter and supply the money, to which he replied "I'm very sorry; I didn't make any such promises."

The Court: All right.

The Witness: "We have had our directors' meeting and we can't call one for another two weeks. As far as we are concerned, we're out."

(580)

Q. Now in the inception of these negotiations had Mr. Gardner talked to you with regard to the race track? A. Yes, he had.

Q. Did you understand from him that they were going to sign the charter? A. He told me—

Mr. Wittner: Just a minute, please. This is talk with Gardner now?

The Witness: Yes.

Mr. Dunham: Yes.

Mr. Wittner: After the 11th?

Mr. Dunham: Any time—

The Court: No, no.

Mr. Dunham: At the inception or even during the negotiations.

Mr. Wittner: I thought you said after the negotiations.

The Court: No, no, he said any time; I think he said any time—at any time was there any discussion

about the race track with Mr. Gardner.

Mr. Wittner: Oh, I see.

A. Yes, at the first meeting he led me to believe, he didn't say it but he led me to believe—he mentioned the race track was very interested.

Q. And you understood from that that they were going to be the charterer.

(561)

Mr. Wittner: Well,—

The Court: Never mind what he understood.

Q. Now, did you at any time agree to charter this boat to Mr. Gardner? A. I did not.

Q. And did you agree with Mr. Gardner that all the terms were to be reduced to writing? A. I certainly did. We both agreed to that.

Q. Now, did you at any time guarantee or represent to Mr. Gardner that you would have a Coast Guard certificate? A. I never did.

Q. Now this discussion with regard to the $7500 in the bank, was that at the time that he asked you if you would take a check? A. He said "You won't take anything but a certified check—I know you won't take anything but a certified check." That was on the Friday—

The Court: And you said "Yes, I will take money."

The Witness: I said "I'll take cash."

The Court: Cash.

Q. Now you have been in the boat business a few years, have you? A. Since 1912.

Q. And you have seen Coast Guard drills? A. Plenty of them.

Q. And what do they do in a Coast Guard drill? Some

(582)

of it, not everything; what is the general of it? A. Well, one of the officers will sound the alarm.

Q. Who? A. Either the captain, the pilot or the mate.

Q. What do they do? You say they sound the alarm. What do they do? Do they whistle or what? A. Ring slow, so many horns, sounds of the horn, seven quick ones and one or two short ones; the men will go to their stations.

Q. Now may I ask, as owner do you ever do that? A. Me personally?

Q. Yes. A. No; I wouldn't know how to do it.

Q. You wouldn't be permitted, would you? A. No. That's the duty of one of the officers. I know how it's done but I wouldn't know how to do it.

Q. But you have seen it done. A. I have seen it done hundreds of times.

Q. And how many men are required? for this boat. A. Enough men to man the boat.

Q. For this boat. A. The lifeboat—not the boat, the lifeboat.

Q. Well how many is that? A. Well, on this boat it would take at least six.

Q. Do they have use for any other men at any other stations?

Mr. Wittner: I don't know what that is nor do I see how that is material.

(583)

Q. During a Coast Guard drill do they have men stationed at any other place besides the boat? A. At a fire—

Mr. Wittner: I don't see how it is material, your Honor.

A. At a fire drill, yes.

The Court: We are talking about a boat drill. Do they test each boat individually?

The Witness: This is lower the boat, one boat at this time now. For a fire— for a boat drill they lower one boat; the men are supposed to go to their station; there is a station built— posted— by the captain; each man is assigned a station; the captain assigns that. When he blows—

The Court: In your test drills, in your test drills they are tested one at a time, are they?

The Witness: The test drills, one at a time, yes.

The Court: Now do you go through all this business of blowing the whistles and blowing the horns?

The Witness: Not the testing of the strength of the equipment, no, your Honor. But fire and boat drill you do. When they have a boat drill, which they have to have once every week according to law—

The Court: Well, your vessel was tied up, was it?

The Witness: That's right.

The Court: Could you have a boat drill as such

(384)

with your vessel tied up?

The Witness: Yes, your Honor.

The Court: How many boats do you let down?

The Witness: One boat in a boat drill.

Q. Will you tell him how you do it? Just tell him—

The Court: I just wanted to find out how many were used.

Mr. Dunham: I think they just row it around, your Honor; they let it down in the water.

Q. Isn't that right, Mr. Fuchs? They let it down in the water and row it around? A. That's right. The deckhands

have to don life preservers, put life preservers on, lower the boat, row it around to the satisfaction of the inspector. Then they bring it back, raise it up again, put her in the cradle and it's through.

Q. Now this is not the time when the captain blows the whistle, is it? A. Yes. You said boat drill. This is boat drill. The other is the equipment.

Q. All right. A. Testing of the equipment.

Q. Now is this a type of inspection or drill that's necessary before the Coast Guard certificate issues? A. Yes.

Q. And you say they didn't have enough men there to conduct that drill? A. No, they didn't.

(585)

Mr. Wittner: Just a minute. I object to that. The question is misleading. There was never any testimony that anybody—that the boat was ready for it or that anybody ever requested it or that Mr. Fuchs requested such a boat drill.

The Court: Well, the question was certainly raised about a Coast Guard certificate.

Mr. Wittner: That's right, sir.

The Court: Now you can't, as I understand this witness' testimony, get a Coast Guard certificate unless you have a lifeboat drill.

Mr. Wittner: That's correct.

The Court: As well as an equipment test. Now the question is whether there were enough men on board the boat for a lifeboat drill.

Mr. Wittner: Except that I think that's his obligation as the owner.

The Court: We are not discussing that.

Mr. Wittner: Oh. That's all.

Q. Well, tell his Honor some of the other things you do in this fire and boat drill.

The Court: No, I don't know— I am not much concerned with it; they didn't have the certificate and they didn't have the boat drill and they couldn't get the certificate without a boat drill so we don't have to go into anything else.

(586)

Q. Did they have an engineer aboard? A. No.

Q. Did they have an oiler? A. Not that I know of.

Q. Are they necessary for this drill? A. They are necessary for a fire drill, yes.

Q. Yes. The have to start the engine, don't they? A. Start the pumps.

Q. The pumps, yes. Can you tell his Honor how many men he put aboard there, besides Jenks and the pilot— was there really a mate aboard there? A. I didn't see the mate. When I spoke to Captain Quillen he told me he didn't know whether he was going to be captain, pilot or mate.

Q. Did you see three deckhands? A. About three deckhands.

Q. Do you know who they were? A. One was named Golday, and I think—

The Court: Well, I don't think it is necessary to know their names, unless you are going to call them as witnesses. If there were three men there I don't care what their names were. They might have been Jo Doaks for all I care.

Mr. Dunham: All right.

Q. Did you have a discussion with Golday? A. Yes.

(587)

Q. And what was that?

Mr. Wittner: Well, that will certainly be objected to.

The Court: Unless it was in the presence of the plaintiff and related to this matter at issue.

Q. Well, do you know whether Golday was there the entire three days.

Mr. Wittner: I beg your pardon? I didn't catch it.

The Court: Was Golday there all three days.

A. Outside of when he left the ship to go over to either New York or New Jersey.

Q. He did leave the ship? A. Yes.

Q. Do you know what day? A. No, I don't know what day it was.

Q. Did he have a conversation with you before he went? A. He did.

Q. What was he doing when you saw him? A. He was packing his bag.

Q. His clothes, too? His clothes? A. Yes, putting his clothes, all his belongings, in his grip.

The Court: I think we will recess now, gentlemen, until two o'clock.

(Luncheon Recess)

(605)

* * *

Direct Examination (Continued) by Mr. Dunham

Q. Did you ever tell Mr. Gardner that you were sick and your wife told you not to have anything more to do with ships in 1951? A. No.

Q. You heard him say that on July 10th you said that, did you not, in court? A. I heard him say that I said it.

Q. Yes.

The Court: And you deny it.

The Witness: I deny it.

The Court: All right.

Q. Now, can you tell us when you went to Block Island? A. I arrived in Block Island July 14, 1951.

Q. And did you stay there all summer, operating a vessel? A. I stayed there until the Sunday after Labor Day 1951.

The Court: You went to Block Island when, July—?

The Witness: July 14, 1951.

The Court: July 14; and stayed there all summer?

The Witness: Stayed there until the Sunday after Labor Day.

(606)

* * *

Q. Did it have to do with business or pleasure?

The Witness: Business.

The Court: Both. Both, I dare say, wasn't it?

The Witness: No, business.

The Court: Business?

The Witness: I had two boats operating, your Honor.

The Court: Well, did you stay there all the time and didn't come back to New York?

The Witness: Didn't come back until after—

The Court: All right.

The Witness: —Sunday after Labor day.

Mr. Wittner: When did you go?

The Court: He said July 14, 1951.

Q. It was after July 14th. A. July 14, 1951, I arrived there.

Q. Yes. Do you recall whether you went up the night before or that morning? A. I left on the 12th.

Q. You did.

Mr. Wittner: I didn't catch the last.

The Witness: I left on July 12th, 1951.

Q. Where did you leave? Up there at that hotel? A. Yes, Morris Hotel in Rockaway Beach.

(607)

Q. And you got there in the morning or at night? A. In the evening, stayed over at a hotel over night.

Q. That was at New London? A. New London.

Q. So you arrived up there on the 14th. A. I got in Block Island on the 14th; went over in the morning of the 14th and arrived in Block Island around 2 p.m. in the afternoon of the 14th.

Q. Did you go over on the Pemoquid? A. On the Motor Vessel Pemoquid.

Q. What hotel did you stay at? A. At the Spring—

The Court: Let me see. You left on the 12th.

The Witness: Yes, sir.

The Court: And you stayed at New London over night on the 12th.

The Witness: The 12th and 13th.

The Court: Oh, you stayed the 12th and 13th.

The Witness: Yes.

Q. In what hotel did you stay at Block Island? A. Spring House.

Q. Do you have the bill here? A. I have the bill.

Q. Do you have the bill of the other hotel? A. No, I paid that in cash. Ipaid the other one by check.

(608)

Q. Now these are just some questions, Mr. Fuchs, that I overlooked this morning: The Libellant Gardner has testified here that when these chairs and equipment was being put aboard, he gave you a memorandum. Is that true or false? A. It's false. He did not give me a memorandum.

Mr. Wittner: Well, I object to his characterizing that statement. He can give a different version but I move to strike out the statement "It's false; also counsel's question, too.

The Court: Well, he said that he did not receive it and that the statement was false. What difference does it make?

Q. Now with respect to this engineer, the engineer for the Diesel: I think you said this morning you did not provide an engineer for the Diesel; did you? On the Calvert? A. I did not.

Q. Did you see any engineer around that Gardner had provided for the Diesel on the Calvert? A. I did not.

Q. He used the word "circumvent." Did you agree to circumvent the giving of a performance bond by providing a Diesel engineer for the Diesel engine. Is that true? A. It's false.

Mr. Wittner: I,—

The Court: No,—

(609)

A. It's not true.

The Court: Just say it's not true.

Q. I will ask it this way: Did you make any kind of a statement or agreement to that effect, to circumvent the giving of a performance bond? A. I did not.

Q. Was that even discussed, that you were going to put an engineer on there? A. No.

Q. Now Mr. Mermelstein when he was here testified, I believe, that he called you three or four times. Did he call you three or four times? A. He did not.

Q. Did he call you at all? A. No, he did not.

Q. Did you call him? A. I called him once.

Mr. Wittner: He didn't say that, anyway.

Q. You called him once. A. I did.

Q. And that was the time which you were talking about this morning when you testified about that call; right? A. That's right.

Q. When was the date of that? A. About the 7th.

(610)

Q. Now, did you agree to pay Gardner or his brother $300 per day for the use of the M/V Sunshine? A. I did not.

Q. Was that figure or any rent of that boat even discussed between you and Gardner? A. It was not.

Q. I show you here what purports to be a cover note—just for the purpose of a sample, just to show what a cover note is. Will you look at that and—

The Court: Well, I don't think there was any statement that any cover note had been given him.

Mr. Dunham: No, they were not furnished him but I thought it might be of help to your Honor to see the exact—

The Court: Nothing will help me which simply has nothing to do with the case.

Mr. Dunham: Yes. Well, what I wanted to show you was a cover note to show—

The Court: I will see what a cover note is like

some time in the course of my life but not at the moment.

Mr. Dunham: All right.

Q. Now with respect to the men to be the crew of this vessel, did you tell Gardner at any time what the number of men should be? A. He looked and I showed him—

The Court: No, did you ever tell him the number of men?

(611)

The Witness: Yes.

The Court: All right.

Q. How many?

The Court: Let's have that. A. Thirteen.

Q. At the time did you show him—

The Court: Was that the full crew, operating crew?

The Witness: On a single crew, your honor, less than 12 hours a day.

The Court: But it was the full crew for operating the vessel less than 12 hours a day.

The Witness: Less than 12 hours in any one day.

The Court: Now was there any discussion about the crew?

The Witness: Yes, sir.

Q. And over 12 hours you have to put another crew on. A. No, there have to be additional men put on.

Q. Now I show you what purports to be a certificate of inspection of the Calvert for 1942.

The Court: 1942?

Mr. Dunham: Yes; yes.

Q. And ask you—

Mr. Witner: I will object to that, your Honor.

The Court: What's that for?

Mr. Dunham: Well, it shows the number of men.

Mr. Witner: At that time there may have been different conditions.

(612)

The Court: No. I don't care about that. The discussion was this—he said he would need 15 men. I don't care what they needed in 1942.

Mr. Dunham: Well, I won't offer it at this time but I want to ask him this:

Q. At the time that you told him the crew was to be 15 did you show him the certificate of inspection which showed the number of men required? A. I did.

Q. And that was the last certificate issued by the Coast Guard for the vessel? A. That was—

The Court: Is that the one you showed him? Is that the one you showed him?

The Witness: Yes; this—

The Court: All right, all right.

The Witness: That was the last.

Q. And that was the last one issued, was it? A. No, there was one more issued after this.

Q. Is #43. A. Exactly the same.

The Court: But that is the one you showed him.

The Witness: Yes, sir.

The Court: All right.

(613)

Q. And that was when the Government had it in '43? A. They took it in '42 and had it in '43. We inspected her in '42 and Levy took her before the inspection ran out.

Q. Yes. So—

The Court: But you showed that to—

The Witness: Yes, sir.

The Court: All right.

The Witness: This is the one that was under glass.

The Court: All right.

Q. That was under glass. A. That's right.

Q. And that indicates, does it, the number of men—

Mr. Wittner: It speaks for itself.

Q. —required, the officers and all the different men? A. It does.

Mr. Dunham: I would like to offer that now, your Honor.

The Court: All right, you may offer it. It may be marked.

The Clerk: Marked Respondent's 7. Is that in evidence?

Mr. Dunham: I offer it in evidence, yes.

The Clerk: Respondent's 7 in evidence.

Mr. Wittner: Your Honor, may I reserve the right to move to strike it after I examine him on this certificate?

The Court: He says that he told him that 13 men were needed and as proof of that he says that he showed him this certificate.

(614)

Mr. Wittner: The certificate shows on its face it is not applicable but I will bring that out on cross-examination.

The Court: All right.

Q. Now at that time was the vessel a motor vessel? What was she propelled by? What was her power? A. Diesel engine.

Q. The same as in 1951; right? A. That's right.

Q. Looking here where it says Calvert—can you point that out to me?

Mr. Wittner: Well, now, it's in evidence.

A. Right here—the passenger vessel Calvert.

Q. I see. Thank you.

The Court: Where does it say the number of people?

The Witness: Right here, your Honor.

The Court: The number of the crew?

The Witness: I'll show you. Right here. Here you are: "Allowed to carry 1200 persons including passengers and crew in the Harbor of New York and tributaries."

The Court: Then it gives the list of—

The Witness: It gives the hours—

The Court: All right.

Q. Now at any time, at any time, that you talked with Gardner, Libellant, did he mention anything about a midday run for the commuters for the use of this boat? A. No.

(615)

Q. Did he mention anything about moonlight sails? A. No.

Q. Did he mention anything about charters around the Harbor area, charters? A. During our conversation he said he had two charters, would I keep the boat available

for him at the same rate and I said no.

Q. When was that? A. Oh, about the 9th of July.

Q. The 9th of July. A. The 7th or the 9th.

Q. Did you have any other conversation with him about this? A. About charters?

Q. Yes. A. I just told him that I would let him take the boat for the duration of the charter party and that was all.

Q. I see. A. Until we cleaned that situation up I'd have nothing to do about anything further.

Q. Now, did you tell him at any time that you were having difficulty purchasing life preservers? A. I did not.

Q. Now let me ask you: Was it difficult to purchase life preservers at that time? A. It was not.

(616)

Q. Could you buy them in the market if you had the money? A. You could buy all you wanted if you had the money.

Q. Did you buy some? A. I bought some children's life preservers.

Q. I see. And what about chairs? Did you buy any chairs at that time? A. I bought chairs at that time.

Q. Did you have any difficulty buying chairs? A. No, sir.

Q. Now may I ask you, do you recall the price of a chair at that time, a new chair? A. I paid $765 for 270 chairs, which was about $2.30 apiece.

Q. So you provided how many chairs? A. Two hundred and seventy, brand new ones.

Q. That was for the Calvert. A. That's right; put them aboard the Calvert.

Q. And was that before these conferences where he would not sign the charter? A. Yes. No, this was July 6th.

Q. July 6th. A. I think it was—

Q. Have you got the bill? A. Let me give you the bill. No, that was June 14th.

Q. June 14th. And who did you buy them from? A. I bought them from the Chair Company of America.

(617)

Q. Where are they located? A. Well, I haven't their address here. This is—

Q. Is that the bill? A. This is just the delivery.

Q. I see. A. The slip, and the check.

Q. And what else did you buy for that boat, that vessel? A. I bought 70 cork, children's cork life preservers; I bought six solid cork ring buoys; I bought 600 feet of ⅜ sisal line; I bought 2 carbide water lights and I bought 6 paddles.

Q. Now that sisal line, is that the type of line that that vessel requires? A. Oh, no.

Q. What? A. The vessel requires 5½ inch line.

Q. Well, what was this sisal line for? A. That was to tie up the paddles and things on the life rafts.

Mr. Wittner: Give us the dates while you are at it.

The Witness: The what?

Mr. Wittner: The dates when you bought these things.

The Witness: The date shipped was July 6, 1951.

Mr. Wittner: What is that, July 6?

The Witness: July 6.

Mr. Wittner: What did you buy on July 6?

The Witness: I just read them off.

(618)

Mr. Wittner: Oh; the ring buoys and the—

The Witness: Children's life preservers, the

ring buoys, the signal line, the water lights and paddles.

Q. Now did the Sunshine or Gardner bring aboard any fire axes? A. No.

Q. Any fire extinguishers? A. No.

Q. Did Gardner at any time tell you that he would bring items aboard at a reduced rate? A. No.

Q. When you were talking about the $400 a day, did you say that that was conditioned upon your providing a Coast Guard certificate? A. No.

Q. Now at last time, in June and July, when he made the inspection, what did he do? I mean was it a minute inspection or just a cursory looking at the vessel? A. Well, he walked around the ship. I don't know what he was looking for. He walked around the ship.

Q. Now let me direct your attention to this inspection pursuant to the Court order; what did he do then? Did he bring down the life preservers and feel of them or did he just look at them? What did he do? A. He just walked around the ship and glanced at them and glanced at the

chairs, went upstairs and glanced at those, and came downstairs and left.

Q. About how many minutes was he aboard? A. Not more than 30 minutes. I have a record of it here some place.

Q. And tell me, are those life preservers—where are they placed? A. A lot of them are overhead in racks.

Q. And did he have a couple of men with him? A. He had two men with him.

Q. Did you have somebody with you? A. I had two men with me.

Q. Did you follow him around? A. I followed him around.

Q. And who were the men with you? A. My son and my chief engineer on the New Bedford.

Q. Did they follow him around, too? A. They followed around, too.

Q. Was there any discussion between you and Gardner? A. The only discussion was, he says "I think there's so many here, so many chairs and so many life preservers." I said "You're inspecting them, not me."

Q. And that was the only discussion. A. That was all that was said.

The Court: When he said "so many" he gave a number?

(620)

The Witness: He gave—he said "I think there's so many, about so many here."

The Court: I mean he gave a number; he didn't say—

The Witness: Oh, no, he gave a number, a round number, your Honor.

The Court: Yes.

Q. Did he give you some kind of undertaking when he came aboard that he would not sue you if he were injured? and the other men, did they do that? A. Yes, they gave me a letter saying they held me free of any claims against —for personal injuries to them going aboard.

Q. You required that, did you not? A. I required that.

Q. Now, Gardner states that you said that it was an excellent suggestion when he said to you that you should buy all this gear and all this equipment. Did you ever say it was an excellent suggestion? A. Never.

Q. Did you have insurance on the Calvert when all this was going on there? A. I did not.

Q. With all these men? A. I did not. They weren't my men. I couldn't insure somebody else's men.

Q. No.

(621)

The Court: No, did you have insurance on the Calvert?

Mr. Dunham: We mean in June and July. Is [illegible]t you said. That's what I mean.

The Witness: No.

The Court: What kind of insurance do you mean? Hull or engine or what?

Mr. Dunham: No, they didn't have to have it. Did they take out any kind of insurance?

The Witness: No.

Q. You have no insurance. A. No.

Q. How about this time in December of '54, whenever they came aboard with a Court order. A. No.

Q. Did you have any insurance? A. No.

Q. Did you ever agree to pay seven fifty for that gangway or gangplank? A. I can't hear you.

Q. Did you ever agree to pay $750 for that gangplank? A. I did not.

Q. Was there any arrangement or agreement between you and Gardner that the insurance would be delivered the minute that the Coast Guard certificate was obtained? A. No.

(622)

Q. Did Mr. Gardner ever tell you on July 5th that the insurance had been arranged on the vessel? A. He said he had spoken to somebody at Despard & Company about it.

Q. Did he say at any time it was fully arranged? A. No, he did not.

Q. Now with respect to this Diesel engine, did you ever tell Gardner that you didn't want a "cluck" on there, coming on the vessel "and ruin my Diesel"? A. I did not.

Q. Did you ever use that term "cluck" about an engineer? A. No, I do not.

Q. Did you ever agree with this man that you would put a Diesel engineer on there? A. I did not.

Q. There was never any discussion, was there? A. No.

Q. And therefore you didn't say to give a performance bond because you were going to put on a Diesel engineer, is that right? A. No.

Q. Does a performance bond have anything to do with the engine whatsoever? A. Definitely not.

Q. As a matter of fact, if the engine didn't work it would be your responsibility, wouldn't it? If the engine didn't work it would be your responsibility, wouldn't it? A.

(623)

When do you mean now? after he takes it?

Q. Yes. A. If it worked when he took it?

Q. Well, I don't know, but if he has the boat out and the engine breaks down, whose responsibility— A. It's his responsibility, according to the contract, to repair her, keep her in repair.

Q. Now I believe we have covered this about circumvent, all this talk about the Diesel, put your engineer on board the Calvert—I think you answered that. A. Yes.

Q. Now can you tell us the purpose or the reason for a performance bond? A. Yes, to guarantee that he will perform the conditions of the written charter.

Q. Did you hear Mr. Dellenberger testify from Despard's here?

The Court: I think if you will read the charter, it describes what the performance bond was for.

Mr. Dunham: All right. Then I'll drop it, your Honor.

Q. Now, Mr. Gardner has said here "Mr. Fuchs was on board the Calvert and a man whom he introduced as his brother-in-law was" with you. Was your brother-in-law ever on that vessel? A. No, never.

(624)

Q. What is your brother-in-law's name? A. Raymond J. Webb.

Q. Did you ever tell Gardner that Mr. Webb was your brother-in-law? A. I did not.

Q. Now with respect to this new 9-fathom 8-inch line put aboard, was there any use whatsoever for such a line aboard that vessel? A. No.

Mr. Wittner: Now, if your Honor please, as your Honor has observed, I haven't objected to all this but it seems to me all of this has been covered by Mr. Fuchs a few times; it's going over and over it again. I do want to get a chance to get on with this case. He has covered all those items before.

Mr. Dunham: I have not.

Mr. Wittner: He said it was an old—

Mr. Dunham: I haven't covered it, I said.

Mr. Wittner: He said it was an old shaggy rope.

The Court: I have a notation about the rope and he said it wasn't the kind of rope described, that as a matter of fact it was frazzled at the end.

Am I right?

The Witness: That's right.

The Court: You have been over that.

Mr. Dunham: All right.

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Mr. Wittner: All of these items he has been over.

Mr. O'Brien: No.

Mr. Wittner: Isn't that right, Mr. O'Brien?

Mr. O'Brien: No.

Q. May I ask you if you ever—

Mr. Dunham: I may have asked about that one. I am sorry.

The Court: All right, go ahead.

Q. Did you agree to buy that old line for any price? A. I did not.

Q. Now, did you see 40 gallons of paint brought aboard? A. I did not.

The Court: He told us what he saw brought aboard.

Mr. Dunham: All right.

The Court: He said he saw a couple of pails or half-pails filled with paint and oil.

Mr. Dunham: All right, we will pass that right up.

Q. I would like to know this, be particular about this, because Gardner mentioned 3-inch stock and die, 2-inch stock and die, 1-inch — all these personal tools. Did you see those? A. No. I did not.

Q. Do you know whether he brought any of those aboard? A. I didn't see them.

Q. Did you agree to pay him $200 for ladies' room equipment? A. I did not.

The Court: Did you agree to pay him any money

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for any supplies which he was to bring aboard the Calvert?

The Witness: I did not.

The Court: No matter what they were.

The Witness: No, sir.

The Court: Ladies' toilet facilities or ropes or paint or chairs or life preservers or tools or swabs or buckets or paints.

The Witness: I did not, sir.

Mr. Dunham: Thank you and I'll skip all of that.

Q. Did you ever say to Mr. Gardner "I'm sorry, I'm not going to go through with this deal at all"? A. I did not.

The Court: You said you weren't going to go through with the deal but the accompanying language wasn't quite that, as I recall it, "I'm sorry."

The Witness: He told it. I didn't say that.

The Court: As I recall it.

The Witness: That's right, your Honor.

The Court: You said you were sick —

The Witness: I said I was sick and tired of his stalling and I wanted him to get off the boat— either put up or shut up and get off the boat, with his crew and his material.

Q. Did you say "You can sue me" to Gardner? A. He said "You're leaving"— I didn't say that; I did not say that.

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Q. As a matter of fact, was Captain Jenks there at all when this conversation was going on? Was Captain Jenks within hearing when you and Gardner were talking, when you said to take his stuff— A. Which day? Which day?

Q. When you said "Get your stuff to hell off the boat." A. He was up in the forward end of the boat, over a hundred feet away.

Testimony of Ernest E. Fuchs, Direct

The Court: Well, was your language couched in sufficient decibels to be heard a hundred feet away?

The Witness: I think not, sir.

Q. As a matter of fact, didn't you hear Mr. Gardner so testify in his examation before trail?

Mr. Wittner: Well, now—

The Court: I don't care whether he did or not.

Mr. Dunham: All right.

Q. Did I ask you anything about the sanitary facilities? A. No, you didn't.

Q. Well, what can you say as to that? What do you consider as a ship man the sanitary facilities on a boat of this type? A. The fresh water system, for washing, which you have to have, and toilet bowls and urinals.

Q. Now were the toilet bowls and the urinals hooked up to the salt water? A. They were hooked up but the pumps hadn't been run.

Q. Hadn't been run. What about the fresh water?

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A. The same thing.

Q. There was no engineer on it so there were no pumps operating, is that it?

Mr. Wittner: No what?

A. No pumps operating because there was no engineer there to operate them.

Q. Yes, no pumps were operating. Now, did you tell Gardner that you had given the gateman instructions to allow nobody on the Calvert? A. I did not.

Q. Did you ever say that you would want at least ten days' to two weeks' charter money in advance? A. Never.

Q. You never used that expression? A. Never.

Q. Did you ever say you would take five thousand? A. Never.

Q. Now, did you say "We'll arrange for the payment of the materials later, whether we apply it against the charter money or not, or how we pay it, or whether I pay it cash, we'll discuss that"? A. Never agreed for any payment of any material.

Q. Now, when you handed him the proposed charter did he say "Well, this contract doesn't embrace the points which

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we were talking about and it looks foreign to our contract"? Did he say that? A. No, not to me.

Q. Did you say "Well, this is a form, another form of contract I am going to use in another instance and do you approve it as to form"? A. I did not.

Q. Now, did you say that you would take it back and make another contract, revise it? A. I did not.

Q. Now, Mr. Lohman has testified here and said that you said that you were sick and you weren't going in the steamship business the rest of the summer. Did you ever say that to him, that you were sick? A. I did not. I said I was sick and tired of Mr. Gardner—I didn't say to Mr. Lohman, I said to Mr. Gardner "I am sick and tired" of his stalling, to put up or shut up.

Q. I am talking about Lohman now. A. I didn't tell Mr. Lohman, no.

Q. Do you recall whether Lohman came to see you there? A. Down at the boat?

Q. Yes. A. He testified he came down a week or ten days after— I wasn't there. How could I tell it to him any time?

The Court: Did he come at any time?

The Witness: No, I didn't tell him that.

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The Court: Did he come at any time to see you?

The Witness: No, I don't recall him coming, your Honor.

Q. Did Luke Lynch come down there? A. No. I didn't recognize Luke Lynch here the other day.

Q. Did you talk with Lynch at Perth Amboy? A. No.

Q. Three or four days after this vessel was towed over there? By the way, how was the vessel towed over?

The Court: By a tug.

A. By the Tice Towing line tug.

Q. Did they put a man on to steer it? A. The same as they did when they brought it there.

Q. Now three or four or five or six days after that, were you around the deck sweeping up? A. I was in Block Island.

Mr. Dunham: That's all.

The Court: Mr. O'Brien?

Mr. O'Brien: I have no questions.

* * * *

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Newark, N. J., Friday, May 4, 1956

* * * *

ERNEST E. FUCHS, resumed the stand.

By Mr. O'Brien:

Q. Mr. Fuchs, in your forty-odd years as a boat owner and operator, have you bought and sold new life preservers? A. Yes.

Q. And have you bought and sold used or secondhand life preservers? A. Yes.

Testimony of Ernest E. Fuchs, Direct

Q. Prior to 1951 when was it that you bought new life preservers? A. In 1949.

Q. And what price did you pay for those life preservers? A. Two dollars and forty cents for the new ones.

Q. Now when these life preservers were brought aboard the—

The Court: Was that $2.40?

The Witness: Two dollars and forty cents each.

Q. When these life preservers were brought aboard the Calvert from the Sunshine did you have the opportunity of observing and inspecting them? A. Yes.

Q. Will you tell his Honor how they compared with the life preservers which were already on the Calvert and owned by the Calvert, with respect to age?

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Mr. Wittner: Well, I will object to that.

The Court: Well, now, you had an expert here who couldn't testify and you asked him if he would testify to the cost of secondhand life preservers. You have made a claim for those life preservers.

Mr. Wittner: Yes, sir.

The Court: Mr. O'Brien is entitled to show what he can about the condition of the life preservers brought on, and, if he can, and the cost of them.

Mr. Wittner: Oh, I know he has a right to do that; that's perfectly proper.

The Court: Well, if he has, let him proceed to do it.

Mr. Wittner: But comparing them with new ones—it sounds like a vague sort of situation.

The Court: I don't know what you want to compare them with.

Mr. O'Brien: The question was—

The Court: I don't care. Go ahead. Ask your question.

Mr. O'Brien: May we have the question read?

The Court: Yes, read the question.

Q. (Read by the Reporter).

Mr. Wittner: It is as to the form of the question.

The Court: Unless you could show what conditions the Calvert life preservers were in—

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Mr. O'Brien: I will withdraw it entirely and proceed directly to it.

The Court: He may describe the condition in which they were.

Mr. O'Brien: All right.

Q. Will you describe the condition in which the life—

The Court: You saw these life preservers, did you?

The Witness: Yes, your Honor.

The Court: All right. Now describe the condition as you observed them.

Q. These were the life preservers, you remember, from the Sunshine over to the Calvert, not the ones that you had on the Calvert. A. Not the ones on the Calvert.

Q. That's right. A. Well, I observed by looking at the date they were manufactured that some of them were eight to ten years old.

Q. Now from your experience in purchasing second-hand or used life preservers, have you an opinion and can you say with a reasonable degree of certainty what the value of those life preservers was apiece? A. Between 75 cents and a dollar and a quarter.

Q. Now did you see the chairs that were delivered or removed from the Sunshine to the Calvert? A. I saw them putting them on.

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Q. Were they new chairs? A. Secondhand.

Q. In your experience as an operator and owner of boats did you ever buy new or secondhand chairs? A. I have bought new chairs at between around $2.80 apiece and I have bought secondhand chairs for fifty—

The Court: How much was that?

The Witness: Two dollars and eighty cents.

The Court: That's the same type?

The Witness: The same type folding chair, wooden folding chair.

Q. Is that what you call the square chair that has been described? A. I don't know what the name of it is but it was a wooden chair.

The Court: There were two types of chairs brought on as described to the Court. Now I don't know whether there were or not but there was testimony that there were two types brought on, one of which was called a square chair and the other a circus chair.

The Witness: I don't know the circus chair.

The Court: You don't know the term.

The Witness: I don't know the term.

The Court: What kind of chairs did you see brought on?

The Witness: Those were regular—

The Court: Square wooden—I mean wooden folding chairs.

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The Witness: Wooden folding chairs, yes, sir. All the others that were brought on were wooden folding chairs.

The Court: All right.

The Witness: From the Sunshine too.

Q. Well, listen to this question: You observed these chairs and you inspected them, did you? A. I saw them putting them aboard.

Q. Now have you an opinion and can you state with a reasonable degree of certainty what the value of those chairs was, how much apiece? A. Between 50 and 75 cents. I have bought some for 50 cents.

Q. Now, Mr. Fuchs, the group or the gear that was characterized here as deck equipment, did you see that when it was brought aboard the Calvert from the Sunshine? A. I saw them throw some mops on the boat and a couple of mattresses; that's all.

Q. Well, have you bought mattresses and mops and brooms. A. Yes, I have bought mattresses and mops and brooms.

Q. What would you say the value of that equipment was that was brought on the Calvert from the Sunshine? A. Well, to me, it was worthless.

Q. All right. Now there has been something said by Mr. Gardner about some sort of a machine for the lounge, the ladies' room. A. Yes.

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Q. Did you see that? A. I did.

Q. And can you describe—

The Court: A machine, was it?

Mr. O'Brien: A machine some sort of a machine.

Q. Will you describe that to his Honor?

The Court: I just didn't understand the word.

A. It was a dispenser to go in the ladies' room.

Q. I see. And can you describe that, the condition of that, to his honor? A. Yes, it was broken.

Q. Well, have you in your experience bought machines of that character? A. No, we didn't buy any of those.

Q. Have you an opinion as to the value of— A. Well, this was worthless because it was broken.

Q. Now there is just one other question: Before any of this material was brought on the Calvert had you started painting the Calvert? A. Yes.

Q. All right. Now did you buy paint yourself? A. I did.

Q. Was there paint remaining and aboard the Calvert before Mr. Gardner put any of his paint aboard the Calvert from the Sunshine? A. I did.

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Q. And can you describe—

The Court: A machine, was it?

Mr. O'Brien: A machine, some sort of a machine.

The Court: I just didn't understand the word.

Q. Will you describe that to his Honor? A. It was a dispenser, to go in the ladies' room.

Q. And can you describe that, the condition of that, to his Honor? A. Yes, it was broken.

Q. Well, have you in your experience bought machines of that character? A. No, we didn't buy any of those.

Q. Have you an opinion as to the value of— A. This was worthless because it was broken.

Q. Now, there is just one other question: Before any of this gear was brought on the Calvert, had you started painting the Calvert? A. Yes.

Testimony of Ernest E. Fuchs, Direct

Q. All right. Now did you buy paint yourself? A. I did.

Q. Was there paint remaining and aboard the Calvert before Mr. Gardner put any of his paint aboard the Calvert from the Sunshine? A. Yes.

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Q. How much paint remained there aboard the Calvert? A. There was 25 or 30 gallons.

Q. Was that sufficient to do the painting, all the required painting, on the ship? A. That was enough to complete it, what the shipyard hadn't done my painter hadn't done.

Q. Now, Mr. Fuchs, yesterday afternoon Mr. Wittner asked you, page 32,—

Mr. Wittner: Who asked him? Did I ask him?

Mr. O'Brien: You did.

Mr. Wittner: Mr. Fuchs?

Mr. O'Brien: Yes.

Mr. Wittner: I didn't ask him any questions yesterday.

Mr. O'Brien: No, no. I am wrong. Before you finished your case you read some parts of Mr. Fuchs' deposition or examination before trial, which was on page 32.

Mr. Wittner: Yes, that's right.

Mr. O'Brien: Now, without repeating— may I go along without repeating all the questions?

The Court: Yes.

Q. Do you remember that, Mr. Fuchs?

Mr. Wittner: Do you want to read more of the record?

Mr. O'Brien: No, I am not reading a thing except what you read.

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The Court: No, just what you read.

Q. These are the questions, referring to chairs—

Mr. Witnner: On what page?
Mr. O'Brien: On page 32, Mr. Wittner.
Mr. Wittner: Yes?

Q. Question, the first question you read:

"Those chairs remained on board the vessel, didn't they?

"Answer: Yes.

"Question: Are they still there?

"Answer: I moved them off to have a trial trip.

"Question: When did you move them off?

"Last December.

"Question: December of 1952?

"That's right.

"Question: Did you put them back on again?

"No, they are on the other boat.

"Question: Which other boat?

"On the New Bedford."

Now, Mr. Fuchs, will you tell us which chairs you referred to?

A. Yes, I referred to the 45 cartons which contained 6 chairs each of the brand new chairs that I had bought in June and put on the Calvert.

Q. Did you refer in any way to any of the chairs that Mr. Gardner claimed he took off the Sunshine and put on the Calvert, in answer to those questions? A. No.

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Q. After you put in this Diesel motor in the Calvert did you have a trial run to ascertain the number of knots the Motor Vessel Calvert could make? A. Yes.

Q. Well, what speed did she attain in knots? A. She made about 10½ knots.

Q. Now are you familiar with the run from Pier 80 to 69th Street Brooklyn and to Atlantic Highlands? A. Yes.

Q. From your experience, Mr. Fuchs, with the speed of the Calvert, is it your opinion that the Calvert could make one trip from Pier 80 at 11:15 in the morning, to stop at 69th Street— and then stop at 69th Street Brooklyn, and then proceed from 69th Street, Brooklyn, to Atlantic Highlands, and then return from Atlantic Highlands to Pier 80, New York City, leave Pier 80 again at New York City and go to Atlantic Highlands, and after completing that trip, return from Atlantic Highlands at 7 o'clock back to New York? A. No, sir.

Q. Have you an opinion on that? A. She couldn't—

Q. Have you an opinion? Yes or no. A. Yes; yes.

Q. What is your opinion from your experience? A. She couldn't make the trips.

Mr. O'Brien: I think that completes it, your Honor.

(674)

A. She couldn't make the trip.

Mr. O'Brien: I think that completes it, your Honor.

Cross-Examination by Mr. Wittner:

Q. Mr. Fuchs, I will start with the—

Mr. O'Brien: Oh, excuse me, Mr. Wittner. May I now offer the exhibits on behalf of the respondents that were marked in evidence on the Libellant's case?

The Court: Let's do that at the end of your case, so that we can go right ahead with the cross-examination.

Mr. O'Brien: Thank you.

The Court: You won't forget it and I won't forget it.

Mr. O'Brien: I will make a note for Mr. Dunham.

The Court: Please. All right.

Q. Mr. Fuchs, if I may take up the last question you answered, you said the Calvert did 10½ knots? A. Yes.

Q. Well, the Calvert hadn't been in operation at any time, had it?

The Court: He said on the trial run.

Q. Well, on the trial run you didn't run at full speed, did you? A. Yes.

Q. In any event—you mean you let her out full speed? A. Yes.

Q. Full power? A. Yes.

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Q. Now 10½ knots is the equivalent of 11¾ miles an hour, isn't it? A. Well, I would have to figure that out.

The Court: Well, we know what 10½ knots is.

Mr. Wittner: All right.

Q. You know, do you not, that the distance between New York and Atlantic Highlands is 19 miles? A. I didn't measure it. I don't know what the mileage is. I know the run.

Q. Now you are giving us an opinion as to whether the boat could make the distance between the area that Mr. Gardner testified to from New York to Atlantic Highlands and you say it could not. How can you give such an opinion if you don't know the distance between New York and Atlantic Highlands? A. Because I know that other boats—

Q. Well, that's irrelevant.

The Court: Let him answer, let him answer.

A. Because I know that other boats that have been on the run couldn't get down there in time to make the daily double and they were faster boats than the Calvert ever was since she has been built.

Q. That's what you base your opinion on. A. That's what I base my opinion on.

Q. Now let's take it on the question of mileage. A. I don't know anything about mileage. I am telling you what (676)
they do.

Q. All right. Just a minute. You heard Mr. Gardner say that he figured on arriving—starting at 11:15 and arriving at 1:15. There is two hours. At that rate, at the 10½ knots per hour the boat could do,—

The Court: If you are going to indulge in mathematics you will indulge in them with me in your memorandum.

Mr. Wittner: All right.

The Court: He is not going to give any mathematical opinions.

Q. In any event, Mr. Fuchs, your know that the track did not start until 2:30 in the afternoon, don't you?

Mr. O'Brien: Well, I object to that. He didn't say anything about the track. He said about closing the window for the daily double.

Mr. Wittner: Just a minute.

The Court: What was the question again, please?

Q. (Read by the Reporter).

Q. You know that, don't you, Mr. Fuchs?

The Court: Well, whether he knows it or not, you have had the evidence as to when it happened.

Mr. O'Brien: He doesn't know anything about when the track opened.

The Court: And I am not going to let you or Mr. O'Brien and certainly not any witness take over my functions. Please remember that.

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Q. Mr. Gardner testified that he would return to New York from Atlantic Highlands by 5:30 in the afternoon or thereabouts. A. I don't think he did.

Q. Well, that's when he picked up the last load in New York to go back to Atlantic—

The Court: What are you driving at? We have got—

Mr. Wittner: To show that there is so much difference in the time element there is no question about the time you can make these trips.

The Court: Well, all right, then; let me determine that, will you, when you argue it?

Mr. Wittner: All right. Thank you, Judge.

Q. Now you said yesterday, Mr. Fuchs, that you didn't want to deal with Gardner. A. I said I didn't want to deal directly with Mr. Gardner.

Q. You didn't want to deal with him at all, did you?

The Court: You didn't want to deal with him as principal.

The Witness: As principal, your Honor, that's right.

Q. You said because you had heard some rumors. A. That's right.

Q. Did you make any suggestion of that kind at all in your deposition? A. No.

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Q. In your deposition you testified a number of times that you were making the deal directly with him, didn't you?

Mr. O'Brien: I object to the form of that question.

The Court: No, if you have the deposition read it by question and answer.

Mr. Wittner: Yes.

Mr. O'Brien: If he was asked that it would be a different thing.

Q. I am going to read to you a number of passages from your testimony, Mr. Fuchs. Page 4:

Mr. O'Brien: Page what, please?

Mr. Wittner: Page 4.

Q. The question was: Referring to the first meeting that you testified to.

"Tell us exactly what conversation you had at that time.

"Answer: Well, he came to see me to find out whether I would charter the Calvert to him for the racing season of 1951 at Monmouth race track. I told him that I would charter the boat to him under certain conditions."

You gave that testimony, did you not?

Mr. O'Brien: Now, wait, That question starts not on page 4 but page 3, doesn't it?

The Court: Well, if there is anything else you want to read you may—

Mr. Wittner: It starts at the bottom of page 3 up to the top of page 4.

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Mr. O'Brien: Page 3, yes.

Testimony of Ernest E. Fuchs, Cross

The Court: Now is there anything else you want to suggest that he read at the same time? You see, I am at a loss; I haven't a copy of this.

Mr. O'Brien: I haven't an extra copy but I will give you my copy.

The Court: No,—

Mr. Wittner: I have an extra copy.

The Court: Have you an extra copy? All right, let me have it. (Handed up). Thank you.

Mr. O'Brien: Now that's at the bottom of page 3 and top of page 4, is that right?

Mr. Wittner: It starts with the last question on page 3 and goes to the top of page 4.

Q. Now again, in the middle of page 4:

"Question: When you say you talked about the conditions, tell us exactly what you said about the conditions.

"Answer: Well, I can't remember exactly.

"Question: As nearly as you can.

"Answer: I told him I would charter the boat to him at a certain rate" et cetera. All I am interested in is that part "to him."

Mr. O'Brien: No, I submit that the entire answer should be read.

The Court: No, "at a certain rate to be arrived at, providing he gave us insurance on the boat,

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supplied the crew, paid all expenses, and gave us a performance bond."

Mr. Wittner: I am reading these things only on the question—

The Court: I know it but you are going to read what is significant.

Mr. Wittner: All right.

Q. "Question: All right, what did he say?" The same page.

"He asked me to draw up the papers, and give them to him; which I did."

The Court: The next reference is page 6, bottom of the page.

Mr. Wittner: Yes.

Q. "Question: Did you have any talk with him when you gave it to him?

"Answer: Only"—

The Court: This refers to what? The charter.

Mr. Wittner: The so-called charter agreement.

Q. "Answer: Only that I told him that that was a charter party under which I would charter the boat to him."

Next, page 7, lower half of the page:

"Question: What talk did you have?

"Answer: I asked him if he had signed the charter party, and if he was ready and able to supply the performance in lieu of the insurance.

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"Question: What did he say?

"Answer: He said he would arrange for that. I asked him about the money, and he said he had $7,500 in the bank, and that he was going to get the balance some place else."

Now if I may stop here to ask a question before I read some more passages: Mr. Fuchs, when you said that he had the money and he would put it up, weren't you dealing with him directly? A. No, my—

Q. No, you have answered. Now page 8: At the top of the page. "Question: When:

"Answer: Well, at one of the meetings that we had. We had several meetings. At one of the meetings, I told him he couldn't have the boat unless he paid for the full charter hire in advance."

Weren't you dealing with him when you said that?

Mr. O'Brien: Well, I object to that form of a question, if your Honor pleases, whether he—Well, I will consent that that was the question asked and—

The Court: Well, in answer to that question he may say what he had in his mind.

Mr. O'Brien: Yes. I mean I will consent that that was the question—

The Court: Afterwards you may point out the language and I will determine just what I believe

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to be the legal significance of it.

Mr. Wittner: All right, sir, I will leave it all to you and just read a few more passages.

Mr. O'Brien: And I will consent that as to any question that was asked, the answer Mr. Wittner read is the testimony he gave.

The Court: All right.

Q. Now on page 10, at the top of the page:

"Now then, what happened at the third meeting toward the end of June?

"Answer: I asked him if he was ready to sign the contract, and perform the conditions on it, relative to the insurance and the performance bond, and pay the money, and he said he had the money, but he didn't have it with him, and he would give it to me at some later date."

And towards the bottom of the page:

"Question: Just what was said about it?

"Answer: Well, I told him he would have to pay the full charter hire in advance."

Page 11:

"Question: Was anything said about signing this agreement at this third meeting?

"Answer: Yes; I wanted to know if he was ready to sign the contract."

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Page 12. No, that's not exactly significant there.

The Court: All right.

Mr. Wittner: Page 23, I think, is the next passage, the middle of the page.

The Court: All right.

Q. "Question: What talk did you have with him?

"Answer: I asked him about a charter party, is he going to sign, or isn't he; is he going to give me the money, or isn't he; is he going to pick up the insurance policies, or isn't he; is he going to supply the performance bond, or isn't he? I said, 'If you don't, I am going to take the boat out of here.' "

Q. Now that referred, Mr. Fuchs, to the very last day, the so-called blow-up, is that correct? A. That's right.

Q. Yes. And at that point you said you wanted him personally to sign that agreement, didn't you? A. No, I didn't have that in mind at all.

Q. You didn't have it in mind. A. No.

Q. But nobody else could sign it except him. He was the only one there, wasn't he? A. Oh, yes, they could.

Mr. O'Brien: Well, I object to the form of that question.

Q. Page 27:

"Question: What talk did you have with him?

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"Answer: I told him I wouldn't spend any more money finishing the boat up until he had signed the contract for

charter hire, and had given me the insurance policies, and the performance bond. I wasn't going to spend any more money on it."

Q. That was all your testimony, wasn't it, Mr. Fuchs? A. If it is in the book that was my testimony, yes.

Q. You said yesterday here in the court room that you gave him the charter party on July 2d, didn't you? A. I said I gave it to him on July 2d?

Q. Yes. A. I don't think so.

Q. Well, that's the notation I have in my notes. A. Well, maybe you have but I don't think I said July 2d.

The Court: What is your recollection?

The Witness: My recollection is that I gave it to him at the second meeting, which was about June 15th, to which I testified originally.

The Court: Now, let's see, You said in early June, June 7th, —

The Witness: Yes, I —

The Court: You typed it up that night.

The Witness: And gave it to him at the next meeting, which was about June 15th.

The Court: About ten days later you gave him the contract, either the original or a copy, and Gardner said it was long and he wanted to take it home

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and read it over.

The Witness: Yes, sir. That's on that July 2d.

The Court: July 2d, as I have it right here.

Mr. Wittner: Well, at one point he had said July 2d —

The Court: I don't recall that at all.

Mr. O'Brien: Well, now I object to the statement that he said July 2d.

What are you referring to? The deposition?

The Court: I have no notation of it. He said ten days after the first meeting, which would make it about June 17th.

Q. Well, of course, you have re-read your deposition since last night, haven't you? A. Since last night? No.

Q. You know very well what you testified in your deposition, don't you? A. Sure I do. I always read it.

• • •

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Q. Now you testified yesterday that the very first meeting you told him you would draw up the charter and the price was fixed, didn't you? A. That's right.

Q. Did you testify to that in your deposition?

Mr. O'Brien: I object to the form of that question, if your Honor pleases, unless that direct question was asked.

The Court: Unless the question was asked, I don't know—he doesn't have to testify completely to the whole situation unless the questions are asked. If you have anything in the deposition which contradicts anything of his testimony you may read it.

Mr. Wittner: Yes, sir. I am going to take it up.

Q. Page 4: "I told him"—I will precede that with the question:

"Question: When you say you talked about the conditions, tell us exactly what you said about the conditions.

"Answer: Well, I can't remember exactly.

"Question: As nearly as you can.

"Answer: I told him I would charter the boat to him at a certain rate to be arrived at, providing he gave" insurance and other things.

Now, at that time did you prepare a—was that testimony correct, that you gave in the deposition?

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Mr. O'Brien: I object to the form of that question.

The Court: What is this supposed to contradict?

Mr. Wittner: He said yesterday that they had agreed on the price at that meeting, at this first meeting.

Mr. O'Brien: Well, I submit that that's not in contradiction of any date upon which the testimony is he gave Mr. Gardner the contract.

The Court: Well, I think throughout this case all of you gentlemen have been straining at gnats and swallowing camels and I would suggest that you quit straining at the gnats.

Mr. Wittner: Quite right. I will omit many things.

The Court: All right.

Q. However, you say now that you prepared that agreement in June, the first meeting in June. A. That's right.

Q. That would be June 7th, you say. A. I said—I didn't prepare it at the meeting, no. I went home—

Q. All right. A. I went home and prepared it, between the 7th and the time I gave it to him around the 15th.

Q. All right. And when you prepared it you inserted the date that you prepared it? A. No, I did not.

Q. The opening statement of this charter party agree-

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ment that you produced—

Mr. O'Brien: Respondent's 1.

Q. —Respondent's 1, recites "This bare boat charter made and concluded in the City of New York on the (blank) day of July, 1951,"—Now this purports to recite the date when you agreed on terms? A. No, no.

Q. Doesn't it? A. No.

Q. It does not? A. No.

Q. You have prepared many agreements in your life, have you not? A. I wouldn't say many. I have prepared some.

Q. A number. A. I didn't know when this was going to be signed so I couldn't put the date in.

Q. Mr. Fuchs,—

The Court: Well, why did you put in the date July?

The Witness: Your Honor, I may have been confused about the charter starting in July. I didn't know when it was going to be signed so I didn't change it. I wrote it—I went home and wrote it and I may have been confused when I put that in. It was left blank, the signatures were left blank because, in answer to the question before,—

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The Court: All right,—

The Witness: —where your Honor said you would let me answer,—

The Court: We are only just being concerned about the July business.

The Witness: Yes, that's so.

The Court: All right.

The Witness: It was just either a typographical error or I was confused with the date the charter was to start.

Q. Let me see, Mr. Fuchs. You now say that you inserted the month of July because you were confused? A. Yes.

Q. Now between June 7th and the 15th, as you testified, were you confused that that could be the month of July? A. I was never asked the question before.

The Court: No, no, no. Were you confused about it?

Mr. O'Brien: I submit—

The Court: He has answered that the reason he put July in there was because he doesn't know whether it resulted from his confusion or the fact that he had in mind that he thought the charter would be in July.

The Witness: In July, that's right, sir.

Q. Well, Mr. Fuchs, I call then your attention to paragraph 1 in this charter agreement in which you specify that the charter is to start on July 7th. A. That's right: that's right.

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Q. Yes. A. It was to start on July 7th.

Q. Yes. A. That's what confused me— I presume; I don't know why I put July—

Q. Wait, Mr. Fuchs, please. A. Well, you asked me a question. Do you want me to answer it?

Q. You specify there in your so-called charter the specific date when you say it was supposed to start. A. That's right.

Q. But in the first, opening part of that paragraph you recite the date the contract was made, don't you? A. No, I—

The Court: No.

A. No, I don't.

The Court: No, he states he specified the date that the charter was signed, to be signed. The charter was never signed.

Mr. Wittner: I am going to ask some more questions about it and I think your Honor may like to have this agreement before you (handing to the Court).

The Court: Go ahead.

Testimony of Ernest E. Fuchs, Cross

Q. Don't you know from your experience in writing contracts that a contract can be signed one month to start the next month? A. Well, I know it can be signed one month and start a year away. I mean—

(691)

Q. Yes; and the date that would be inserted would be the date it was signed, to commence at a later date; you know that, do you not?

The Court: Now you are coming back again to why he didn't put it in in June. He has told you why.

Mr. Wittner: All right.

The Court: I don't care to hear any more about it.

Q. Did you have the name "Calvert" written into that agreement at the time you prepared it? A. Yes; and the official number.

Q. Will you take a look at this contract?

Mr. Wittner: I will ask your Honor now to look at it.

Q. Isn't the name "Owner of the Calvert" out of line with the rest of the line?

The Court: Isn't what?

Mr. Wittner: Isn't it raised higher than the rest of the typing on that line?

The Court: Oh, for Heaven's sake! You should see my typewriter, how it works, how the alignment gets.

Q. Well, now—

The Court: You know, if I were you—this is only a suggestion, a suggestion at this time—I would confine myself to the significant elements of this case.

Mr. Wittner: All right, sir.

Testimony of Ernest E. Fuchs, Cross

Q. Now, tell me: Talking about the material—you didn't buy that material? A. I definitely did not buy it.
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Q. And you say it belonged to Gardner? A. I don't know who it belonged to.

Q. All right. But it didn't belong to you. A. It didn't belong to me.

Q. Now in your provision for insurance didn't you provide that all the insurance in case of fire destruction, and some other destruction, was to go to you as the owner? A. In the case of constructive total loss, yes.

Q. And you made no provision then as to— A. When I wrote that charter I didn't know he was going to—

Q. Just a minute.

The Court: No, no, no. If he doesn't say it I am going to say it.

Mr. Wittner: Paragraph 14(b).

The Court: Go ahead. When you wrote the charter—?

The Witness: I didn't know he was going to put anything on, your Honor. How could I cover it?

The Court: When this was written there was no question of that at all.

Q. Then you made no amendment to protect him for the merchandise? A. He never signed it. How could I amend a charter that wasn't signed?
(693)

Q. Well, you didn't offer to amend it, did you?

The Court: He said, if you will recall—he testified that he gave the copy to Mr. Gardner and did not get it back.

Q. Didn't you give him the original? A. I think I gave him a copy.

Q. Well, yesterday you didn't know whether you—

The Court: Well, now, have you the original, if he had it. Have you the original? No, you haven't, because he says it was returned, as I understand it.

Mr. Wittner: Gardner said he didn't keep it.

The Court: Mr. Gardner said he didn't keep it.

Mr. Wittner: Yes.

The Court: He did not keep it. Now here is what looks like an original, of whatever it purports to be. He says that his recollection is that he gave him a copy, which he didn't get back.

Q. Now, in the deposition you produced this charter that you produced here, did you not? A. In what deposition?

Q. Your deposition. You produced the same charter agreement that you produce now in court. A. I don't know. You took it or somebody took it and marked it. I don't know which one it is. You took it at the deposition, at the time of the trial before examination.

The Court: What? What is this?

(694)

The Witness: He wanted to know if that's the one I produced at the time.

Mr. O'Brien: Perhaps we can concede that. There isn't any question about it. I think that —

Mr. Wittner: We marked it as an exhibit.

Mr. O'Brien: It was marked as an exhibit in the deposition.

Mr. Wittner: That's right.

Mr. O'Brien: Yes. That is my recollection. I wasn't there but from reading it.

The Witness: There was— could I say something?

The Court: Yes, go ahead.

The Witness: There was some talk about it at the time and Mr. Wittner says "Can I take it? I will return it." Now whether this was the one or that was the one— I presume this was the one.

Q. Well, instead of returning it— A. I don't know.

Q. — Your lawyer gave me a photostat of it, didn't he? A. I don't know.

The Court: Well, it was produced at the examination before trial, was it?

Mr. Wittner: Yes.

The Witness: Yes, sir.

The Court: And in whose custody had it been? Who offered this? This is Respondent's 1 in evidence.

(695)

You offered it. Now in whose custody was it before it was offered.

Mr. Wittner: It was in their custody. Page 5 of the deposition will show it, your Honor. Mr. Dunham produced it and gave me a photostat.

Mr. O'Brien: That's on the deposition of Mr. Gardner.

The Court: Well, there is no marking on this, in any event.

Now what I want to find out is, it was offered by the respondent and in whose custody was it since the time of the deposition?

Mr. O'Brien: In Mr. Dunham's.

Mr. Dunham: It was in my custody.

The Court: Mr. Dunham's, all right.

Mr. Dunham: It was during the examination of Mr. Gardner. I think he testified about it.

The Court: All right. My question is, this was produced at the examination and it has been in your custody since then until it was offered here in evidence.

Mr. O'Brien: Is that right?

Mr. Dunham: The original? Is this the original?

The Court: The one that is offered in evidence.

Mr. Dunham: Well, the one that was introduced was a copy of the original, at the examination before trial. I have it here.

(696)

The Court: The one that was introduced—

Mr. Dunham: Yes.

The Court: —at the examination before trial?

Mr. Dunham: Yes.

The Court: Let me see that please.

Mr. Dunham: Yes.

The Court: Is there any idea that the copy introduced at the examination before trial differed from this which is now offered in evidence?

Mr. Wittner: I don't think so. I haven't examined them both but I don't think so.

The Court: All right. Then we needn't discuss it any further.

Never mind, never mind, Mr. Dunham.

Mr. Dunham: Here it is (producing).

The Court: Oh, all right. If you have it pass it up.

This was produced at the pretrial and marked Defendant's 1.

Mr. Dunham: I think that's a photostatic copy.

The Court: Yes, it is a photostatic copy of the one which is now offered in evidence. I am satisfied that it is an exact copy. All right, sir (returning document to Mr. Dunham).

Go ahead.

Q. Now, Mr. Fuchs, you said you laid stress on a performance bond, didn't you? A. (No answer)

(697)

Q. I will withdraw that for a minute. Your so-called charter called for $75,000 for hull insurance and $75,000 for P. and I. insurance. A. That's right.

Q. Now wasn't your agreement for $75,000 hull and machinery and $250,000 for P. and I.? A. It definitely was not.

Q. Well, Mr. Gardner nevertheless ordered insurance for $250,000, did he not.

The Court: That's not material at this moment.
Mr. Wittner: All right.

Q. Now, you said you wanted a performance bond. Under your so-called charter agreement you were going to get all your money in advance, were you not? A. Yes.

Q. And you were going to get protection, ample protection, for insurance, for damage to the boat, or any other damage that might occur, were you not? A. Yes.

Q. Weren't you amply covered without a performance bond? A. Oh, no, no.

Q. Well, didn't you agree that you would have your own engineer, too, to look after your Diesel engine? A. That has nothing to do with a performance bond.

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The Court: No, did you?
The Witness: No, I did not.

Q. Well, was there any talk between you and Mr. Gardner about you producing an engineer? A. The only talk, I told him I reserved the right to place an engineer aboard the boat.

Q. That was an important feature with you, wasn't it? To give you the right to furnish your engineer? A. That was one of the important.

Q. You didn't put that, though, into this proposed charter agreement, did you? A. I think I testified to that at the pretrial.

Q. I am asking you now. You didn't put that into your charter agreement—

The Witness: Wait a minute, now. This is in the charter agreement:

"The Charterer agrees to remove the master, chief engineer or any other officer or member of the crew of the said Motor Vessel on the written request of the Owner."

Mr. Wittner: Yes.

Q. Now, you testified several times yesterday that Gardner hadn't furnished you with the cover notes, cover notes or binders for the insurance. A. That's right.

Q. Didn't your alleged charter say that you were not (699)
to get those cover notes until the boat was ready to move?

The Court: Where does it say that, please?

"All insurance shall be taken out in the names of the owner and the charterer as their interest may appear. All cover notes and policies shall be delivered to the owner before the Motor Vessel leaves its berth in the Port of New York."

Q. Well, the boat wasn't ready to leave on July 7th, was it? A. No, she was not.

Q. You prepared an agreement sometime in June, fixing July 7th. A. That's right.

Q. There was a lot of work to be done on your vessel, was there not? A. We did a lot of work.

The Court: At what time? At what time?

Mr. Wittner: In the month of June.

The Witness: Yes.

Testimony of Ernest E. Fuchs, Cross

Q. You made a complete overhauling job on your vessel didn't you? A. Yes.

Q. Did you know in advance that the boat would be ready on July 7th? A. We expected it was going to be ready on July 7th.

Q. As a matter of fact, the boat wasn't even ready on July 10th, was it? A. No, it was not.

(700)

Q. But you wanted Gardner to give you the money, $11,200, and insurance and a bond at the time of the signing of the agreement, although the boat was not ready? A. I wanted him to—

Q. Yes or no. Did you want him to do that? A. Yes; when he signed the charter.

Q. Now you know, of course, as an experienced boat owner that insurance is prorated on a daily basis, do you not? A. Yes.

Q. So that if Gardner furnished you with the insurance in June and the boat could not be ready until some later date, in July, he would have to pay for something he didn't use? A. He would not have to pay for something he didn't use.

Q. Well, didn't you say the minute insurance is issued it becomes payable? A. I did not say that.

Q. Well, didn't you say it is prorated on a daily basis?

The Court: He said it is prorated on a daily basis but he did not say that it was effective at the time it was issued.

The Witness: Written.

The Court: Or written.

Q. You say when a binder is issued—that makes the insurance effective, does it not? A. It makes—

(701)

The Court: Look, look: Is that a question of law or is it a question of fact?

Testimony of Ernest E. Fuchs, Cross

Mr. Wittner: I think your Honor can answer that.

Q. Now the same is true of a performance bond; you also pay a rate on it for the time it is issued, do you not? A. I don't know that.

Q. You don't know what? A. I don't know that.

Q. You mean you have had no prior experience with performance bonds? A. I have never paid for any performance bonds.

Q. I say you have never had any experience with performance bonds? A. What do you mean by experience?

The Court: Did you have performance bonds on any of the charters that you had for your boats before?

The Witness: No, your Honor.

Q. And in all the years of your experience you don't know that the fee is payable on the issuance of the bond? A. I do not.

Q. And in addition to that you wanted Mr. Gardner to pay the entire charter hire for days that the boat wasn't able to run, did you not? A. When that charter party was drawn I didn't know when it was going to run.

(702)

Q. But you wanted him to pay in advance beginning from July 7th—

The Court: He wanted him to pay the full charter price for the days, he says, when the track was running, and that amounted to $11,200, as I recall it. That's what he said he wanted in advance.

Q. Although your boat was not ready. A. I didn't know, when I drew that contract, that the boat wasn't going to be ready.

Testimony of Ernest E. Fuchs, Cross

Q. You knew, did you not, Mr. Fuchs, that the track opened in June, June 19th or 20th? A. I don't know any time the track opens or closes.

Q. Now you knew that the Sandy Hook was not operating at that time, didn't you? A. What time?

The Court: At the time when negotiations--

The Witness: Started?

The Court: Yes.

The Witness: She never did come out—

The Court: Did you know she wasn't going to run?

The Witness: I wasn't sure. I had heard rumors she wasn't. When he asked me was she, I couldn't say; I had heard rumors that she wasn't coming out.

Q. Did you give this testimony in your deposition, Mr. (703)
Fuchs, page 28:

"Question: Did he tell you that the Sandy Hook was not operating any longer?

"Answer: I knew she wasn't operating."

Did you give that testimony? A. At what date?

Q. You gave that testimony on December 2, 1953.

The Court: No, no; on what date was this conversation?

Mr. Wittner: Well, that was a few days before Sunday. That appears on page 27.

The Court: That would be July 5th.

Mr. O'Brien: July 5th, yes.

The Witness: I knew she wasn't running July 5th, yes.

Q. And Gardner told you he would get permission to get some of the equipment from the Sandy Hook, did he not? A. He volunteered to get permission.

Testimony of Ernest E. Fuchs, Cross

Q. Now when you moved your vessel—well, what time of the day was it that you had this last blow-up with Gardner? A. It was in the afternoon of July 10th.

Q. Was it late afternoon? A. Well, I can't pinpoint it; maybe 3, 4, 5 o'clock.

Q. And you moved the boat when? Early the next morning? A. The next morning.

Q. What time in the morning? A. I don't know.

(704)

Q. As a matter of fact, you had ordered it moved on July 10th, hadn't you? A. I did not.

Q. Well, were you there when the boat was moved? A. Yes.

Q. And don't you know whether it was early morning or not? A. It was before noon.

Q. Now, you told Gardner to get off and take his men off late afternoon, even as late as 5 o'clock in the afternoon, and you moved it the next morning. A. Yes.

Q. Did you make any provision for that equipment he had aboard? A. I told him to take it off. He put it on; to take it off.

Q. That was 5 o'clock in the afternoon, wasn't it? It was late afternoon? A. In the af'ernoon.

Q. Yes. You didn't give him any time to take it off, did you?

Mr. O'Brien: I object to the form of the question.

The Court: Well, I think he said it was in the late afternoon and the boat was moved the following morning at 11 o'clock. We can draw our own conclusion.

Mr. Wittner: All right.

Q. You made no effort to return it, did you? A. I did not.

(705)

Q. As a matter of fact,— A. I wouldn't know where to return it.

Testimony of Ernest E. Fuchs, Cross

Q. You wouldn't. Well, you knew Gardner's place of business, didn't you? A. I did not.

Q. You had no number for him, no address for him? A. I tried to get him at the—

Q. Wait. Did you know a telephone number for him? A. He gave me a telephone number.

Q. Where? A. I don't know where it was. I haven't it now. He gave me a card.

The Court: Do you know whether it was a New York telephone number?

The Witness: It was some number over on a pier on the North River, your Honor. I called there a half dozen times through all these negotiations and could never get a reply—don't know where he is.

Q. Don't you know Mr. Gardner never had an office on the North pier, North River pier? A. I don't know where he had—

The Court: Whether he knows it or not he said he got the number from him and he called him there.

The Witness: He gave me the number and I called him.

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Q. When would you say you tried to get him at the pier? A. Oh, a half a dozen times during the negotiations. I can't—

Q. Did you try to get him there in June? A. Oh, I can't stipulate that.

Q. Now you testified that your second meeting with him was June 15th, or the middle of June. A. Around the middle of June.

Q. All right. Now did you give this testimony, page 12:—

Mr. O'Brien: Is that the testimony here in court or on deposition?

Testimony of Ernest E. Fuchs, Cross

Q. "Question: No date was specified as to when he would come in?

"Answer: I don't recall any special date. I called him several times. We couldn't get him at his office?

"Question: When? After this third meeting in June?

"Answer: It might have been between the second and third. But I called his office.

"Where?

"At the East River pier."

The Court: "At the North River pier."

A. That was a typographical error.

The Court: "At the North River pier."

Q. Now in June you knew he had an office with the Sandy Hook office at 141 Broadway, did you not? A. I did not.

(707)

Q. You knew he was the president of the Sandy Hook corporation? A. The card he gave me said—

Q. I am asking you whether you knew. Didn't you know that? A. I knew that, yes.

Q. And you were familiar with the Sandy Hook line? A. I knew of them, yes.

Q. And you said you tried to get him at his office. Wasn't that his office? A. I tried—

The Court: He said he tried to get him at his office at the North River pier, which does not differ from the testimony he gives here now.

Mr. Wittner: Well, I am questioning as to whether there was any—

The Court: Did you know of any other office that he had?

The Witness: The only thing that I knew—

The Court: Did you know of any other office that he had?

The Witness: No, your Honor.

The Court: Did you know of any other telephone number where he could be reached?

The Witness: Only what he gave me.

The Court: All right.

That 25 per cent that I spoke about the other day is still holding, unfortunately.

(708)

Mr. Wittner: Well, I am skipping many things that are unimportant.

The Court: You are not skipping enough for me, I will tell you, from the things that you are doing now.

Q. Now, as a matter of fact, you testified that you weren't at all interested in returning the equipment, didn't you?

Mr. O'Brien: I am sorry; I didn't hear that question, your Honor.

The Court: "You were not at all interested in returning the equipment."

The Witness: When did I testify—

The Court: I don't think he said that at all. He said he didn't return it, made no attempt—

The Witness: I didn't return it; I made no effort; I didn't know where to return it.

Q. All right. Page 52 of your deposition:
"Question: Did you ever return it, is the question?
"Answer: I wasn't interested in returning it."

Mr. O'Brien: Wait a minute.

The Court: That's in the middle of the page, just below the middle of the page.

Mr. O'Brien: All right. Thank you.

Q. You had no interest at all as to what—

The Court: Wait a minute. Finish the answer.

(709)

Mr. Wittner: "I wasn't interested in returning it. I told him to take it off. He didn't take it off, so I took the boat away to the shipyard."

Q. Other than that you made no effort to return it, and you never notified him or anybody else to come and take it, did you, you personally? A. I didn't know where to notify him. I tried to get him before and couldn't get him.

The Court: Did you tell him where you were taking your boat, your vessel?

The Witness: Yes, I told him it was being towed to Perth Amboy, New Jersey, where our boats are tied up.

Q. But you waited until long after this suit was started and then you put in a bid for the material, didn't you? A. I did not.

Q. Who did put in a bid? A. I don't know, outside of what I heard.

Q. Do you know James A. Mendler? A. No, not James A. Mendler.

Q. Or John A. Mendler? A. I know John A. Mendler.

Q. And was he your manager? A. He was my operating manager out of Providence.

Q. And did your lawyer put in a bid for him? A. My lawyer did not that I know of put in a bid for him.

(710)

Q. Who put in a bid? A. I don't know.

Q. Well, does the name Sadaro sound familiar to you? Xavier N. Sadaro? A When you asked me that question at—

Q. Just a minute. Tell me now. A. Now it does, yes.

Q. Do you know who he is? A. Now I do, yes.

Q. He is associated or works for Mr. Dunham? Do you know that? A. I don't know whether he works for him or is associated with him.

Q. Well, didn't you ever see him in that office? A. I never saw him in the office.

Q. Did you get any stationery from Mr. Dunham with Mr. Sadaro's name on it? A. I can't say that I did.

Q. Well, I will show you this letterhead of Mr. Dunham—

The Court: What difference does it make? He works for Dunham or he is associated with Dunham.

Mr. Wittner: All right.

The Court: He was the attorney who filed this bid; is that what you are driving at?

Mr. Wittner: Yes, sir.

The Court: All right. Now did you authorize Mr. Dunham or any of his associates to put in a bid

(711)

for this property in behalf of John—what is his name?

The Witness: Mendler.

The Court: Mendler.

Mr. Wittner: Mendler.

The Court: For the referee or anybody else?

The Witness: I did not.

Q. Didn't you know about it? A. I did not until after it was done.

Q. Your lawyer didn't tell you about it? A. He did not.

Mr. Wittner: I offer in evidence the—

The Court: Well, lawyers ordinarily don't tell their business to other people unless they are authorized to do it.

Testimony of Ernest E. Fuchs, Cross

Mr. Wittner: I offer in evidence the bid put in on behalf for this equipment dated January 16, 1953.

The Court: All right, it may go with the other bid.

Mr. O'Brien: May I see it?

Mr. Wittner: It is a photostatic copy (tendering).

Mr. O'Brien: Is this for evidence or identification?

Mr. Wittner: I am offering it in evidence.

The Court: Well, it is not your case now. You may mark it for identification and offer it in evidence later.

The Clerk: Marked Libellant's 2 for identification.

The Court: And gentlemen, you will all have an

(712)

opportunity when these are finally offered in evidence to note your objections or make such comment as seems fitting.

Q. Now this letter is signed Sadaro but wasn't it dictated by Mr. Stefferson? A. I don't know.

Q. Who represented you in this case? A. I don't know who dictated the letter.

Q. Take a look at— A. I never saw the letter.

Q. Take a look at the initials?

The Court: What difference does it make?

A. I never saw the letter.

The Court: Unless he was acting for this man?

Mr. Wittner: Well, I want to—

The Court: You have dictated letters and Gardner is not responsible for them unless he authorized you to. Now you may put them in and allow me to

draw such inference as I think logically may be drawn from them.

Mr. Wittner: That's right. I am doing it for the inference.

Then I offer in evidence another letterhead of Mr. Dunham with the signature of Raymond E. Stefferson.

The Court: Let me have it.

Mr. Wittner: (Handing it to the Court): Just to show the initials on the bid, for that purpose only.

(713)

Mr. O'Brien: What has that got to do with Sardaro?

The Court: Well, we will note in the record that Raymond E. Stefferson is an associate of Corydon B. Dunham.

Mr. Wittner: And it shows that his initials are on this bid for this merchandise.

The Court: Suppose they are?

Mr. Wittner: All right. That's what I am offering it for, for whatever inference—

The Court: All right; let me see it.

Mr. Wittner: "R.E.S." at the bottom (handing to the Court).

The Court: Now this is on the letterhead of Xavier Sardaro. Who is Xavier Sardaro? He was a former associate of Mr. Corydon Dunham.

Mr. Wittner: He was at the time the bid was made associated with Mr. Dunham.

The Court: I don't know. The letterhead shows Xavier N. Sardaro, attorney-at-law, 20 Broad Street.

Was he at that time associated with Mr. Dunham, do you know?

Mr. O'Brien: Your Honor, I am trial counsel. I don't know.

The Court: You don't know.

Mr. Wittner: We know, sir, his name was on the door and they had letterheads—

(714)

The Court: Well, he may still have his name on the door and not be associated with Mr. Dunham.

Mr. O'Brien: I don't know a thing about it.

The Court: Now there was a time — when was this? Well, let's see. This is dated January 16, 1953.

Mr. Wittner: All right, I have a later letterhead of Mr. Dunham with the same name on it.

The Court: Wait a minute. Now will you please —

Mr. Wittner: I am sorry.

The Court: Let me finish what I am going to say?

Mr. Wittner: I am sorry, sir; I am sorry.

The Court: This letter from Xavier Sardaro is dated January 16, 1953. There is a letter of Raymond E. Stefferson who at the time was associated with Mr. Corydon B. Dunham dated November 30, 1953, and on the letterhead of Mr. Corydon B. Dunham are the three names Raymond E. Stefferson, Xavier N. Sardaro and Frederick Pennell. Now whether Mr. Sardaro was associated before November, in January of 1953, I don't know, but it is in the record in any event for what it is worth.

Q. Now among the items that you testified to yesterday with respect to the equipment you said was a 20- or 30-foot old, shaggy rope. Do you remember that? A. I remember it, yes.

Q. Wasn't that a hawser put on board your boat long enough to tie the boat to the pier?

(715)

The Court: Is this a hawser put on by Gardner?

Mr. Wittner: By Gardner, yes.

The Court: At the time of this original transfer on Sunday?

Mr. Wittner: That's right, yes.

The Witness: No.

Q. Well, it was a hawser, was it not? A. It was a piece of rope.

Q. Was it a rope or a hawser?

The Court: Well, what is the difference?

A. It was a hawser.

The Court: What is the difference between a rope and a hawser?

The Witness: No difference, your Honor.

Q. All right. And a swinging line, in order to tie a boat to a pier, would have to be at least the length of the boat, would it not? A. I didn't testify he put a swinging line on there.

Q. All right, I am asking; you tell me. A. I don't know. It's up to the captain what he wants.

Q. Well, have you got any use for a 20- or 30-foot rope on board ship? A. Of 8-inch line? No, not on my boat.

Q. The only value, the only use for a rope on your boat, on the Calvert, would be hundred and thirty-five foot line, (716)
enough to tie to the pier, wouldn't it? A. No.

Q. And still be the length of the boat? A. The boat is hundred and eighty foot long.

Q. All right. You would need at least a rope between a hundred and a hundred and fifty feet, long enough to keep the boat swinging around the pier when you tie it, wouldn't you? A. No, not necessarily.

Q. What length of rope do you think — A. Some captains don't need any rope.

Testimony of Ernest E. Fuchs, Cross

Q. Well, you were fixing up the boat for yourself, weren't you? A. Yes.

The Court: Was there any other rope for tying up boats on the Calvert?

The Witness: We didn't have any aboard then, your Honor. When we tie her up at our lay-up berth we put wire cable.

Q. You didn't have any wire cable on board. A. I said —

The Court: Well, that was when it was tied up with wire cable. He just said that.

Q. Did you have fire extinguishers on board? A. I did.

Q. Were the fire extinguishers delivered by Gardner?

(717)

A. No.

The Court: I think we will take a recess, gentlemen, for five minutes.

(At this point a short recess was taken)

The Court: I am indulging in the fond hope that this case will be terminated today. I think I have the right to insist that counsel assist in bringing about that desideratum.

All right.

Q. Now, Mr. Fuchs, let me read to you from your deposition page 56:

"Question: And were the fire extinguishers new when they were delivered?

"Answer: No, they were not."

Do you remember that? A. I remember I said no.

Q. But this morning you said Mr. Gardner hadn't delivered any at all, didn't you? A. I didn't say there that he

delivered any. You said were they new. You asked me before that if —

Q. All right. Now tell me: On this inspection certificate, did you produce an inspection certificate of 1942? A. That's right.

Q. In which you said 13 men were required by the Coast Guard.

The Court: That's for the operation of the ship.

Mr. Wittner: For the operation of the Calvert.

(718)

Q. Isn't that right? A. That's right.

Q. Now there is a difference, is there not, in the operation of a vessel, in the number of crew required, as to whether you operate in winter or summer, and whether you operate in inland waters—

The Court: What is the purpose of this? What is the purpose of this question?

Mr. Wittner: Because that applies, that provision in the old one,—

The Court: Applies to what?

Mr. Wittner: To sounds, bays and rivers, and not to inland waters.

The Court: But what has it to do with this case? I don't want to get an education on the general regulations about sounds, bays and rivers.

Mr. Wittner: Well, Mr. Fuchs said that was used as a sample, he showed it to him, it required 13, and that's what he told Gardner.

The Court: Did he show it to him, did he show it to him? I don't care what it requires. Did he show it to him?

Mr. Wittner: I see.

Testimony of Ernest E. Fuchs, Cross

Q. As a matter of fact, Mr. Fuchs, the Coast Guard specified in 1951, at the time they were making the inspection, that the Calvert did not require more than a crew of 9, isn't that right?

(719)

The Court: Oh, you try my patience beyond endurance! I don't care how many they required. The question is whether or not he showed him this certificate at that time. I don't care what they required. The boat wasn't in operation. He didn't have 9 men on board, he didn't have 11 men on board. He told him the number of men he had on board and the number he paid.

Mr. Wittner: This is for operating, your Honor. I want to offer this in evidence, bearing on the question as to whether Mr. Gardner told the truth when he said Fuchs told him it could operate with 8 men.

The Court: You are inquiring into his credibility and you are just as futile about it as the other side is about Gardner's credibility. You must think that I have no judgment at all.

Mr. Wittner: I want to offer in evidence—

The Court: All right, offer it.

Mr. Wittner: —page 17 of this book already in evidence as Respondent's—

The Court: Is it already in evidence? You don't have to offer it again then.

Mr. Wittner: All right.

The Court: You may call attention to page 17.

The Clerk: It is only marked for identification.

Mr. Wittner: It is marked for identification. We

(720)

will wait then until the case is finished to offer it.

Testimony of Ernest E. Fuchs, Cross

Q. Now, in order to pass inspection you needed life preservers, did you not? A. At what time?

The Court: Any time.

Q. Any time. A. Oh, yes, you have to have life preservers.

Q. Well, now, you prepared this inspection before you knew you were making your deal with Gardner, did you not? A. You have to ask for inspection. I asked for inspection.

Q. Before you knew about your deal with Gardner. A. That's right.

Q. And you wanted the vessel certified for 1300 passengers, didn't you. A. That's right.

Q. And you only had about three or four hundred life preservers on board the Calvert at that time, didn't you? A. That's right.

Q. And you needed 830 more. A. That's right.

Q. And whether you make a deal with Gardner or not that's the number of life preservers you need. A. That's right.

Q. Now in order to operate the vessel as a passenger boat you also needed chairs, didn't you? A. Not required. (721)

Q. Well, you mean it is not required for your certificate?

Mr. Dunham: If your Honor please, he was not going to operate it. He said "If you were going to operate it." Mr. Gardner was going to, or the race track, whoever was going to charter it.

The Court: The question is whether or not he had called for an inspection by the Coast Guard and whether at that time it was necessary to have the life preservers. He said yes, it was necessary. Now the question is whether it was necessary to have chairs. He said no, it wasn't necessary.

Testimony of Ernest E. Fuchs, Cross

Q. Mr. Fuchs, when you wanted it certified for a passenger vessel for 1300 passengers you wanted to get your boat ready for use, didn't you? A. Not at that time when I made that application, no.

Q. Well, you were putting a lot of money into getting your vessel ready for operation, weren't you? A. That's right.

Q. And you wanted to do something with the boat, I take it, whether to use it yourself or to charter it to someone else. A. Not necessarily.

Q. You didn't expend all this money just to keep your vessel in drydock, did you? A. To keep her in drydock? No, not to keep her in drydock.

(722)

Q. Or to keep her at the pier? A. I don't know what I would do.

Q. Well, for the boat to function and carry the 1300 passengers for which you wanted her certified, you needed 1300 chairs, didn't you, at least? A. I could have her certified for 500.

Q. Yes, but you were trying to get her certified for 1300, weren't you? A. I didn't necessarily say 1300; 500 or 600 or 300.

The Court: Had you specified just what certification you desired?

The Witness: No, your Honor.

Q. Well, doesn't this inspection report, this Exhibit 5 for identification, show that it was for 1300 passengers?

The Court: That was in 1942, wan't it?

Mr. Wittner: No, in 1951.

The Court: '51?

Mr. Wittner: Yes, sir.

Mr. Dunham: If it will shorten it we will stipulate 1300 and that's what we contend her capacity is.

Q. Does this refresh your recollection that you told the inspector you wanted it certified for 1300 passengers (showing to the witness)? A. No, that does not.

Q. It does not refresh your recollection. A. No, it (723)
doesn't. That's not my request for inspection. That's the Coast Guard's recommendations in there, what's required.

Q. Now you also need fire extinguishers for certification, don't you? A. Yes.

Q. Now if you didn't plan to put your boat in use why did you buy some chairs that you bought previous to Gardner's? A. I bought those for all the boats. The Calvert were there and they were put on the Calvert in the yard when they were delivered.

Q. You did have what, about 250 of your own chairs on the Calvert? A. I had 270 brand new chairs.

Q. Two hundred and seventy? A. Brand new chairs.

Q. Have you got the bill for those 270 chairs? A. I have.

Q. Will you produce it, please? A. Sure. Here is the bill and the check (tendering).

Q. Were these delivered at the Bethlehem yard? A. Yes, at the Bethlehem yard.

Q. The only boat that you had at the Bethlehem yard was the Calvert, wasn't it? A. On what day? I had three boats in there that spring.

Q. At the Bethlehem yard? A. Yes.

(724)

The Court: At the time these chairs were ordered how many boats did you have there?

The Witness: Could I see there the date?

Mr. Wittner: June 13th (handing to the witness).

The Witness: I had another boat in the yard that day that left on June 13th.

Q. What boat did you have?

Testimony of Ernest E. Fuchs, Cross

The Court: Did you put any of those chairs on it?

The Witness: None of those chairs were put on it.

The Court: All right.

The Witness: The Motor Vessel Calvert.

The Court: All right.

Q. As a matter of fact it is stamped shippers to Calvert. A. Well, whatever it says, if it says that.

Q. You mean you had it ordered for delivery to the Calvert, didn't you? A. That's right, because she was at the yard.

Q. Now you also bought some life preservers for the Calvert, didn't you? A. Children's life preservers.

Q. And in order to keep the boat functioning you also needed equipment for the berths for the crew, didn't you? A. I didn't testify I was going to have her functioning.

Q. I am not asking you what you testified. I am asking you now. A. If you mean—

(725)

Q. If you were going to have the boat for operation you would need to equip the berths for the crew, wouldn't you?

Mr. O'Brien: I object to that because there isn't any proof or any claim here that Mr. Fuchs was going to operate the boat.

The Court: Well, I think that it is just commonsense that he would have to provide these things if he were going to operate it himself.

Mr. O'Brien: If Mr. Fuchs himself was going to operate it.

The Court: Yes.

Q. How many berths did you have? A. Well, I haven't a diagram of it. Maybe five, six or seven.

Testimony of Ernest E. Fuchs, Cross

Q. And how many members of a crew to a room according to the Coast Guard regulations? A. I don't know the Coast Guard regulations.

Q. All right. In any event, didn't Gardner bring aboard enough bedding and mattresses for each of the rooms that you undertook to enumerate?

The Court: That's your question and you have wasted all the rest of the time.

Mr. Wittner: That's right, sir; you are right.

A. No, he did not.

Q. Well, you didn't have any equipment of your own for the crew, did you? A. Yes, I did.

(726)

The Court: What equipment did you have for the crew?

The Witness: I had some mattresses and blankets and sheets.

The Court: Enough for—

The Witness: Not for the entire crew. He said I didn't have any.

The Court: All right.

Q. Well, for how many members of a crew did you have equipment?

The Witness: Your Honor, that's a hard thing for me to say.

The Court: Approximately; approximately.

A. Oh, perhaps about a half a dozen mattresses, three or four mattresses and sheets and—

Q. Did you buy any within a month or two of—

The Court: I don't care if he did or not.

Mr. Wittner: All right.

Testimony of Ernest E. Fuchs, Cross

The Court: Will you please get down to the issues here. We have been at this case for all this week and at least 25 per cent, as I said, to be charitable, of the time we have wasted; all of you counsel have wasted at least 25 per cent of this Court's time. I don't mind your wasting your own time but I have other commitments, I have other cases to try.

Q. You never got an inspection, did you, for the Calvert? (727)
I mean you never got a Coast Guard certificate for the Calvert, did you? A. For when?

Q. For 1951. A. No.

The Court: For 1951. We have had that at least fifteen times; at least fifteen times.

Q. And on June 10th and 11th you still needed quite a few things to be done to get your certificate, didn't you? A. June 10th and 11th I needed a lot of things.

Q. July; I mean July. Excuse me. A. No, I wouldn't say a lot of things.

Q. You needed a few then. A. You needed some stenciling to be done.

Q. Was that all you needed? A. And the Coast—fire drill.

The Court: And if you were going to put it in operation you needed life preservers and fire extinguishers—

The Witness: No, on the 10th or 11th, your Honor, all the preservers were there.

The Court: Were those the preservers that were brought over by—

The Witness: It included both; both, your Honor.

The Court: —by Gardner.

The Witness: That was all finished.

(728)

The Court: All right.

Q. And all those that he put aboard were approved by the Coast Guard, weren't they? A. There were enough approved to take care of the complement of the boat.

Q. Well, they were all approved, weren't they? A. I don't know whether he threw any out or not. I didn't watch the inspector whether he threw any out or didn't. He threw a hundred of the Calvert's out because they didn't pass.

Q. But none of Gardner's were thrown out. A. I don't know.

Q. Now this was your obligation, to obtain a certificate, wasn't it? A. I never agreed to obtain a certificate.

Q. Did the Coast Guard give any certificate to Gardner? A. I don't know what the Coast Guard would do.

Q. Didn't you say the Coast Guard wouldn't deal with the charterer, only with the owner? A. I did not say that.

Q. All right.

The Court: Any further questions?

Mr. Wittner: I trust that your Honor will indulge me. I am just looking for the answers in the deposition testimony taken on that.

May I bring that to your Honor's attention later so as not to delay the trial?

(729)

The Court: Yes.

Q. Now, did you have another inspection after July 11th? A. I didn't hear you.

Q. Did you have another inspection by the Coast Guard after July 11th? A. I did not. You mean for the final?

The Court: Any kind of inspection.

The Witness: Well, when we had the trial trip they came down—when we requested permission to make the trial trip they came down.

Q. Wasn't there an inspection in Perth Amboy on July 20th? A. I wasn't in Perth Amboy on July 20th.

Q. I didn't ask you whether you were. Didn't you have an inspection on July 20th? A. I know the inspector—

The Court: Do you know whether there was an inspection on July 20th?

The Witness: I don't know, your Honor. I wasn't there.

The Court: All right.

Mr. Wittner: I call your Honor's attention to page 70 of the book now marked for identification Respondent's 5.

Q. Now, in addition to that did you receive a letter from the Coast Guard dated July 23rd referring to the inspection made on July 20th? A. I did.

(730)

Q. Listing the items still missing? A. I did.

Q. To complete the inspection? A. I did.

Mr. Wittner: I will ask to have that marked.

The Witness: That was an error, your Honor.

The Clerk: Do you want this marked for identification?

Mr. Wittner: Yes, please.

The Court: What is the materiality of that?

Mr. Dunham: May I see it a moment?

The Court: No, I want answer to my question.

Mr. Wittner: Showing how far he was from having the vessel ready on July 11th when he claims he was ready to go through with the deal.

Testimony of Ernest E. Fuchs, Cross

The Court: He doesn't claim it was ready to go at that time.

The Clerk: Is this to be marked, your Honor?

The Court: No.

Q. Now, you repeated over and over again that you wanted Gardner to sign that charter agreement beginning June 15th and to pay you the money. Did you want him to pay you $11,200 for days when the boat wasn't ready? A. I gave him the charter party and asked him to sign it and pay for it.

Q. I know, but you said on July 11th "Here is the (731)
agreement. I want you to sign it and pay me the money called for by this agreement," didn't you? A. That's right.

Q. Well, on July 11th did you want him to pay you as of from, beginning from, July 7th, the full period, although you didn't have the vessel for him? A. I asked him for the money.

Q. For the $11,200. A. Whatever the contract called for.

Q. Now in addition to the payment and the insurance you also had some material of Gardner's on board as additional security, for you, didn't you? A. I did not.

Q. You knew, didn't you, that it was important for Gardner to have the vessel ready for the track before July 4th? Didn't you? A. I didn't know when he wanted it ready for.

Q. Well, didn't you say that he wanted it for the track? A. He wanted it as soon as he could get it, he told me.

Q. Didn't you testify that he wanted it for the track? A. He told me he wanted it for the track.

Q. Yes. And you knew, did you not, that the track was in operation before July 4th? A. I did not know that.

Q. And did you feel in June when you drew that agreement that you could get the boat ready within a very short

(732)

time? A. I definitely did.

Q. There was very little work to be done on it? A. I wouldn't say there was very little work to be done on it.

Q. Well, work that you wanted to do you could finish in a week or two? A. We could finish it by July 7th, I felt.

Q. That was a random estimate? A. It was an estimate.

Q. Now, didn't you take the boat away from Gardner because you wanted to take over this track run by yourself? A. Definitely not.

Q. Didn't you tell Mermelstein— A. I did not.

Q. Wait a minute until I ask my question. Didn't you tell Mermelstein that you wanted the track to sign the contract? A. Your question calls for a conclusion. I—

The Court: No, did you ask Mermelstein to have the track sign the original charter?

The Witness: I testified, your Honor, yesterday that I spoke to Mr. Mermelstein and I told him that Mr. Hill—you wouldn't allow Mr. Hill's conversation to come in—That Mr. Hill had called me, asked me to call them, that they were going to guarantee the performance of the contract.

The Court: The question is did you ask Mermelstein to have the race track take over the charter.

(733)

The Witness: To guarantee the charter.

The Court: To guarantee the charter; not to sign it, to guarantee it?

The Witness: To guarantee it.

Q. All right. I will read from your deposition, Mr. Fuchs, page 49:

"Question: And then you called him?

"Answer: I called him, and he said he wasn't interested in signing charter parties, he hadn't agreed with Mr. Hill to do that at all."

Then lower on the page:

"Question: He said that he wanted the boat on the run?

"Answer: That's right. And I told him that the quickest way to get it on the run, was to sign a charter party for the racing association."

You concede that that testimony was given, do you not? A. (No answer.)

The Court: Do you recall giving that testimony?

The Witness: I think I did, your Honor.

The Court: All right.

Q. Now that talk was after your deal with Gardner blew up, wasn't it? A. I am not sure whether it was before, a day or two before it blew up or after it blew up. (734)

Q. Well, do you mean that you asked Mermelstein to sign your charter while your deal with Gardner was still pending? A. I say that I don't remember which day it was.

Q. Well, now, yesterday you testified that it was on July 7th you talked with Mr. Mermelstein, didn't you? A. No, I did not.

Q. Well, you called up Mr. Mermelstein, didn't you? A. I called Mr. Mermelstein.

Q. Now when Mr. Hill called you, did Mr. Hill call you to intercede for Gardner to see that you gave him the boat?

Mr. O'Brien: I object to the form of the question.

The Court: I'll read some testimony that was given by Mr. Fuchs:

"That is what your nephew told him?

"He told Mr. Hill that. Then Hill called me, and told me of that conversation, and asked me if there wasn't something that could be done so that I would turn the boat over to Mr. Gardner. And I said, 'Yes, if he will fulfill all the

clauses in the charter party, and put up the money, there was nothing to stop him from getting the boat.'

"Then he said, 'Will you take anybody else's guarantee?'

"I said, 'Yes, I will take Mr. Mermelstein's.'

"I didn't say Mr. Mermelstein, I said the Race Track Association, if they would sign the charter party, we would go along on that, without a performance bond."

(735)

Q. Now when Hill called you, was that to intercede with Gardner to ask you to go through the deal with him?

Mr. O'Brien: I object to the form of the question as to whether—

The Court: I have read what the purpose of the thing was.

Mr. Wittner: All right.

Q. Now your counsel asked you—

The Court: I think if you would throw that examination away you would be a whole lot better. Go ahead and examine this man while he is here. Then if you have any direct contradiction, get this out.

Mr. Wittner: All right.

Q. In response to your counsel's question this morning as to whether the chairs that you said you delivered to the Bedford were your personal chairs—I will withdraw that. You were asked whether the portion I read to you from page 52 did not refer to some other chairs instead of the chairs you got from Gardner. Do you remember that? That was page 32.

The Court: Yes, he said that he moved chairs from the New Bedford and he said they were his chairs that he moved.

Testimony of Ernest E. Fuchs, Cross

Mr. Wittner: All right.

The Court: That is my recollection of your testimony. Isn't that so?

The Witness: Yes, your Honor.

(736)

The Court: I don't know why I am supposed to recall this testimony more than you gentlemen are.

Q. Now Series 3, beginning at the bottom of page 31, 32 and 33, that doesn't refer to the chairs that you got from Gardner:

"Question: Now, what else came besides the gangplank and the life preservers?

"Answer: A couple of old benches, and a few cans of paint that were opened up, and a broken dispenser for the ladies' room. And I think they brought a couple of mattresses for the watchmen to sleep on. That's all I recall."

The Court: Will you get down to it?

"Those chairs remained on board the vessel, didn't they?

"Yes.

"Are they still there?

"Answer: I moved them off to have a trial trip.

"When did you move them off?

"Last December.

"December of 1952?

"Answer: That's right.

"Did you put them back on again?

"No, they are on the other boat.

"Which other boat?

"The New Bedford."

The Witness: When I was answering that question, your Honor, I had reference to the new chairs that I took off and put on the New Bedford.

Testimony of Ernest E. Fuchs, Cross

(737)

Q. Now at the time of the examination you testified that the chairs were still on the New Bedford. A. They were, the new chairs that I took over from the Calvert.

The Court: Were any of the chairs that Gardner brought on the Calvert moved to the Bedford—

The Witness: Not that I know of.

The Court: —for this trial?

The Witness: Not that I know of, your Honor.

Q. Then let me read to you some more from page 52:

"Question: Did you ever return that equipment that Gardner put on board?

"He never came for it.

"Question: Did you ever return it, is the question?"

The Court: You have read that already?

Mr. Wittner: Just to show that the chairs he was talking about—

The Court: You have read it already. I remember it.

Mr. Wittner: All right.

Q. Page 58 then:

"Mr. Wittner: Can we send somebody aboard the New Bedford and the Calvert, to inspect the equipment today?

"The Witness: You can put somebody aboard to take it off.

"Mr. Dunham: Why the New Bedford?

(738)

"The Witness: The chairs are on the New Bedford."

Q. Do you remember that testimony, Mr. Fuchs? A. Yes, I was referring to the new chairs.

Testimony of Ernest E. Fuchs, Cross

The Court: Well, they couldn't take the new chairs off, could they?

The Witness: I didn't know what he was going to inspect, your Honor.

The Court: Well you said "You can put somebody aboard to take it off."

The Witness: That's right; aboard the Calvert.

The Court: No, you said—"Can we send somebody aboard the New Bedford and the Calvert, to inspect the equipment today?

"You can put somebody aboard to take it off.

"Why the New Bedford?

"The chairs are on the New Bedford."

Q. Now, Mr. Fuchs, you testified yesterday that Captain Jenks came with the Sunshine and came aboard the Calvert with the material, didn't you? A. I don't know exactly what I said yesterday but I think that was the sum and substance of it.

Q. Well, that's a correct statement, is it? A. To my recollection, he came with the boat.

Q. And you were there at the time and you were there while they stenciled life preservers. A. I was there while they stenciled the life preservers.

(739)

Q. Now in your deposition didn't you say—

The Court: Read it, read it.

Q. Page 17:

"Question: What time of the day was it that you first saw Captain Jenks on your boat?

"Answer: It was in the afternoon, on Monday."

The Court: Do you remember giving that testimony?

The Witness: Yes, sir.

The Court: All right.

Q. Now, did you know that Mr. Gardner was bringing a crew along? A. I did not.

Q. For the Calvert? A. I did not.

Q. Well, when he put the crew on board did you tell him "Don't put the crew on board here because you haven't got a contract with me"? A. I did not. He brought the crew to put his equipment aboard, not—

Q. Well, he left the crew on board, didn't he? A. I wouldn't say he left the crew on board; he left some men on board to stencil the life preservers. I wouldn't call them crew.

Q. Well, those men that were on board stayed there until you told them to get off. A. No, they were not my men; I couldn't tell them to get off, it was up to Mr. Gard-

ner; he hired them and put them there.

Q. Well, Captain Jenks was there. A. Captain Jenks was there.

Q. And the mate was there; you said a Captain Quillan, that you didn't know if he was a mate— A. That's right.

Q. —or some other capacity. A. That's right.

Q. And a few deckhands. A. Two or three men, I said.

Q. And he put a watch on board. A. He didn't put a watch on board. He put a watchman, a man to sleep at night.

Q. All right, a man that slept on board. And those men were there until you told Gardner to take his crew off—didn't you? A. To take his men off, I recall saying.

Q. Yes. Now did you tell Gardner "You have no right to put a captain on board and a crew because you haven't signed a charter agreement"? A. I did not. This captain walked aboard from the Sunshine.

Q. And you were on board the boat every day, weren't you, yourself? A. Practically every day.

• • •

(741)

Q. The New Bedford is an excursion vessel, isn't it? A. That's right.

Q. And you used her even after season? A. Yes.

Q. In the summer time? A. Just in the summer time.

Q. And all you have to do, if you—if you use life preservers of another vessel, all you have to do is to mark out the name of the old vessel and stamp in the name of the new; is that correct? A. Providing the Coast Guard inspector passes them.

Q. Yes, provided they pass the life preservers for quality. A. Providing he passes them.

(746)

Q. Yes. Now did you have many people visiting the Calvert since July 11, 1951?

The Court: For what purpose?

Mr. Wittner: To show—

The Court: I don't care whether he had people visiting there. There may have been thousands of people visiting there; I don't care about that. What do you want to know?

Mr. Wittner: I will put the question another way then:

Q. Did you have your employees on board the Calvert since July 11, 1951? A. On the Calvert?

Q. Yes. A. Yes, we had them on and off.

Q. All right. Now, I asked you earlier as to whether you had testified in your deposition that the Coast Guard would not deal with Gardner but only with the owner—

The Court: You will ask him a question now and then read the deposition if it contradicts him.

Q. Now, tell me, whose job was it to obtain the inspection certificate. A. In this case?

Testimony of Ernest E. Fuchs, Cross

Q. Yes.

The Court: Yes, in this case.

A. I don't know who it was. I didn't guarantee to do it.

Q. Well, did you give this testimony in the deposition? (747)

The Court: What page?

Mr. Wittner: Page 30, the lower half of the page:

Q. "Question: Was Mr. Gardner on board when the Coast Guard Inspector was there, and he said you needed about 100 more life preservers?

"Answer: I am not sure; he may have, he may have not. Because he had nothing to do with the inspection. He would tell me, he wouldn't tell him."

Was that your testimony? A. That was my testimony in connection with what life preservers—

Q. Well, I don't think we need an explanation.

The Court: Yes, we do, about life preservers.

A. (Continuing) He would tell the owner what life preservers he needed, yes, but that has nothing to do with inspection of the vessel; that's equipment, as to what equipment was needed.

Q. Now didn't you say—

The Court: The question was asked "Was Mr. Gardner on board when the Coast Guard Inspector was there, and he said you needed about 100 more life preservers?"

Q. Well, didn't you also say—

The Court: And the next question relates to life preservers.

Testimony of Ernest E. Fuchs, Cross

Q. Didn't you also say as part of your answer "Because he had nothing to do with the inspection"?

The Court: You have read it. I have read it.

(748)

Mr. Wittner: All right.

Q. Now, if I may come back to Tuesday again for a minute, how much time did Gardner spend with you on that Tuesday, the final blow-up? A. Perhaps an hour, a half an hour, an hour and a half; I don't know.

Q. I think you said yesterday that he got there about 4 o'clock in the afternoon. Is that about right? A. Possibly about 4 o'clock.

Q. Now didn't you on that day and before Gardner got to the boat, at 2:10 in the afternoon place an order with the Tice Towing Company to tow the boat to Perth Amboy? A. I don't remember what time it was.

The Court: Well, did you place an order with the Tice Towing Company to tow the boat to Perth Amboy before Gardner got there and before you told him to "get the hell off the boat" with his crew?

The Witness: I think not, your Honor.

The Court: All right.

Q. Well, now, Mr. Fuchs, I will give you a chance to refresh your recollection. The log of the Tice Towing Company is on its way here—

The Court: All right, don't menace him, don't threaten him. That's his recollection.

Mr. Wittner: All right.

(749)

The Court: And it had better be here pretty soon because I am not going to run this case beyond today. It has already taken enough time.

Mr. Wittner: It should be here soon, your Honor. It is on the way.

Q. Now I just want to ask you, Mr. Fuchs, if you will just try to refresh your recollection and see if you can't recall that you placed that order with the Tice Towing Company before Gardner got there on July 10th. A. I wouldn't do that, no.

Q. You mean it doesn't refresh your recollection? A. I wouldn't do that before he got there.

Q. Now I would like to read from page 41:

"Question: Did he say" referring to Gardner "that as long as you were going to have your own engineer, then you knew exactly how the boat was going to be handled—"

The Court: What is this contradiction of? What question have you asked that it contradicts? I am not going to permit you to read this whole deposition when you have the man here, when you can ask him questions and then check it with the deposition. I don't care whether you were going to ask him did he say it; ask him now what he says and if he differs— I am not going to teach you how to try cases any more; I am going to tell you what to do and you will do it.

Mr. Wittner: All right. I would just like to—

(750)

The Court: You will do what I suggest, please. You will ask the question and then if there is anything in there to contradict it, you may read it.

Mr. Wittner: All right.

Q. Did Gardner say to you that as long as you had your own engineer you didn't have to be worried about your engine? A. He did not.

Q. Well, then, let me read this to you?

"Question: Did he say that as long" —

Mr. Dunham: What page, Mr. Wittner?

The Court: 41.

Mr. Wittner: 41.

Q. "Did he say that as long as you were going to have your own engineer, then you knew exactly how the boat was going to be handled —

"Answer: I don't recall him saying that." Did you give that testimony?

A. Well, if it's in the book I gave it.

Q. All right. Did Gardner tell you that he had ordered $250,000 protection and indemnity insurance and $75,000 hull and machinery insurance? A. He did not.

Q. I will read to you from page 41:

"Question: Did he mention $75,000 hull and machinery, and $250,000 protection?

"Answer: I don't remember."

(751)

A. Well, I don't remember.

Q. Was that your testimony at that time?

The Court: What are you doing? Are you trying to attack his credibility? Is that the purpose of this?

Mr. Wittner: Not just to attack his credibility; to support Mr. Gardner's testimony —

The Court: He said he doesn't remember. How does that support him? Please don't pursue the question any further.

Q. Now, when you say you went up to Block Island in 1951, you went up with the New Bedford, did you? A. I did not.

Q. Did you operate the New Bedford in the summer of 1951? A. I did.

Q. Where? A. From Providence to Newport to Block Island.

Q. All right. Where was the enrollment certificate for the Calvert in 1951? A. Where was the enrollment certificate?

Q. Yes. A. I don't know.

Q. Did you have it? A. I did not.

Q. And you have no idea where it was? A. I have no idea where it was.

Q. Well, you know it was not in the Custom House, don't you? A. I don't know where it was, I said.

(752)

Q. Have you found it since? A. I have not.

Q. What is the last time you had it? A. The last time I had it was in 1942.

Q. Well, you stated to the Court that the original as a rule was kept either in your possession or the Custom House and for the inspector you produced —

The Court: He said he doesn't know where it is, that the last time he saw it was in 1942.

Mr. Wittner: I think that's all.

The Court: Now if you are going to ask any questions make them pertinent.

Mr. Dunham: I have only a couple, your Honor. I will be very short.

The Court: Whether you have a couple or not you will make them pertinent.

Mr. Dunham: I will.

Redirect Examination by Mr. Dunham:

Mr. Dunham: I can't recall whether I asked him this question; I would like to ask him, in fear of repetition, but —

Q. Did you at any time tell Gardner that you had taken the enrollment papers from the vessel? A. I did not.

Q. Did you at any time take any enrollment papers from

(753)

the vessel? A. I did not.

Q. As a matter of fact, she has no enrollment papers yet, has she? A. No.

Q. And is this true: that her last enrollment papers were in '42, when the Government took over —

The Court: Oh, he has said it three times.

Mr. Dunham: All right, I will stop there. I know this is getting very, very —

The Court: No, it's not getting. It has been.

Q. Now did you have a sale for this vessel to the Norfolk Company? A. I did.

Q. And were you aboard when the plaster was put on? A. I was.

Q. What were you doing? A. The boat was just about ready to go out a trial trip when the libel was served on the vessel for material that Mr. Gardner—well, he libeled it for the value of the material he claimed he delivered.

Q. And were you able to go through with the sale of it after that? A. No, we was not. We couldn't have the trial trip.

Q. And didn't the proposed buyer withdraw the offer?

(754)

Mr. Wittner: I object to that. It is immaterial.

All right, I will withdraw it.

A. He called the deal off at that time until we got straightened out.

Q. Now, with regard to demanding this $11,200 as charter money, say on the 7th or 8th or 9th or 10th, did you have a reason for that?

Mr. Wittner: Well, I object to that.

The Court: Did you do it?

Yes, he did.

The Witness: Yes, I did.

The Court: He evidently didn't do it without a reason.

Mr. Dunham: Yes.

Q. And was that $400 a day, was that in connection with $400 proposed charter money that you talked about with Gardner? A. Was what?

Q. Was that in relation to the $400 a day proposed charter money that you had talked to Gardner about?

Mr. Wittner: I object to that.

A. That was the agreed price, $400 per day.

The Court: We have been over that six times.

Q. If there were two or three days short, then what would you do? Would you adjust it?

Mr. Wittner: I object to that.

The Court: Did you agree, did you agree, if there were two or three days short, what you would

(755)

do?

The Witness: Nothing was agreed upon, your Honor.

Q. Well, were you willing to give him an adjustment for those two or three days? A. Certainly I was.

Mr. Wittner: I will object to that and move to strike it out because the witness has testified that he wanted it paid in accordance with—

Testimony of Ernest E. Fuchs, Redirect

The Court: He was under a legal obligation to pay it back and if he didn't pay it back willingly he would pay it back unwillingly.

Mr. Dunham: I believe that's all, your Honor.

The Court: All right, step down. Next witness.

Mr. Wittner: Just one question, if I may.

The Court: What is it? What is your question?

Mr. Wittner: There was another trial run in December. He said the deal fell through because—

The Court: I don't care whether there was another trial run in October, December or January.

Mr. Wittner: For the same people.

The Court: I don't care. He is not suing you.

(Witness excused)

(22)

Testimony of Charles E. Gardner, Direct

Direct Examination by Mr. Wittner:

Q. Mr. Gardner, you are the plaintiff or libellant in this proceeding? A. I am.

Q. You know the defendant Fuchs? A. Yes, sir.

Q Had you a talk with him about the Motor Vessel Calvert in 1951? A. Yes, sir.

Q. At that time were you engaged in the shipping business or maritime business?

The Court: Were you the owner of the Calvert then?

The Witness: No.

The Court: What were you?

The Witness: I was the Sandy Hook man that was endeavoring to charter the Calvert.

The Court: Oh, yes.

Q. With what company were you connected at that time, in 1951? A. I was connected with the Sandy ook Line.

Q. And what vessel did the Sandy Hook have? A. At that time they had the SS Sandy Hook.

The Court: Was that one of the Old Central Railroad ships?

(23)

The Witness: Yes, your Honor.

Q. In what way were you connected with the Sandy Hook Company? A. Well, at that time I was the operating manager, operating under a court order for the Southern District in a Chapter XI proceeding as a debtor in possession.

Q. What officer were you of the Sandy Hook Company? A. President.

Q. ere you also a stockholder? A. Yes, sir.

Q. And how many years before that had you been in the maritime business? A. Prior to that time approximately seventeen years.

Q. When did you acquire the Sandy Hook? A. In May 1947.

Q. And before that were you connected with the New Jersey Central Railroad Company? A. Yes, sir.

Q. In the operation of boats, was it? A. That's right.

Q. Was that in the operation of the Sandy Hook or some other boat? A. The Sandy Hook.

Q. And then you acquired it in 1947. A. Yes, sir.

(24)

Q. Along with some associates. A. Yes, sir.

Q. Now, what happened in 1951 by reason of which the Sandy Hook became disabled? A. Well, it goes back to November 1950, while—

The Court: I don't think we need to go into that matter. All we need to know is that the Sandy Hook was disabled.

Mr. Wittner: All right.

Q. When did you contact Mr. Fuchs? A. Well, I had talked to him in 1950. The first time, I met him aboard one of his vessels, the year previously, but in 1951 I called him between the 15th of June and the 24th of June—I can't place the exact date but it was between those dates.

Q. And what talk did you have with him? A. I asked him if the Calvert or any of his other vessels was available for charter for the season.

Q. And what did he say? A. And he told me that he was working on the Calvert, that she was under inspection and that she would be available.

Q. Now when did you see him after that? A. After my call to him I seen him on July 2d.

Q. Of 1951. A. That's right.

Q. Where did you see him? A. Bethlehem Shipyard.

(25)

The Court: When was that.

The Witness: July 2d, your Honor, 1951.

Q. Which part of the Bethlehem Shipyard? Aboard the vessel? A. I seen him aboard the Motor Vessel Calvert.

Q. Calvert. And did you have a talk with him there? A. Yes, sir.

Q. What talk did you have with him? A. Well, I referred to my previous call to him and told him that I was interested in chartering the Calvert for the runs down towards Atlantic Highlands for the season.

Q. And did you tell him why you needed the Calvert? A. Yes, I did. I told him—

Q. What did you tell him? A. I told him that it had now been determined that the Sandy Hook would not make the runs that season and that the race track was then—the run had been opened prior to that and that we were anxious to get a boat in as quickly as possible to put on that run.

Q. Did you tell him what the run was? A. Yes, I told him that the run was from New York to Atlantic Highlands for the race track and also for charters and the various other runs that we normally have during the season.

Q. Did you tell him what runs you have during the season? A. Oh, yes.

Q. What did you tell him about that? A. Well, I told

(26)

him charters. I would just group those into one category. I told him about the race track run, with which he was somewhat familiar but I repeated it, and then I told him that we had a mid-day run for commuters.

Q. Now, did the Sandy Hook operate on that run before 1951?

The Court: Let me interrupt you, if you please. In your contemplation of this type of charter that you were discussing with Mr. Fuchs, would you be authorized to engage the boat and anything you wanted, so long as it was within the purview of the charter? For instance, for using it for moonlight sails and all that sort of thing? or would that have to be a special authorization by a special charter?

The Witness: No, your Honor, as long as it was within the scope of the Coast Guard certificate. That's primarily what would govern the charter.

The Court: Then the charter which you were discussing with Mr. Fuchs was one which would turn practical control of the boat over to you.

The Witness: That's right, your Honor.

The Court: For operation along the lines set down by the Coast Guard.

The Witness: Yes, your Honor.

The Court: All right.

Q. Now, just tell us your complete discussion with him (27)
on July 2d. A. On July 2d I explained that the Sandy Hook wouldn't make that run and that we had already made run for a vessel and that the Calvert, the M/V Calvert, would be—after I had explored the territory quite thoroughly, that she would be the most practical boat for that run; and I asked Mr. Fuchs then how soon he thought that she would be certificated and ready for operation, and he told me that he was then working on her inspection and that it shouldn't take any time at all, any appreciable time. However, he did need certain items to have her certificated as a passenger vessel and he was having difficulty purchasing these items, especially life preservers, and I asked him then how many life preservers he would need and he said he would need 800 and some odd life preservers and he said that would

be difficult to obtain at this time without putting an order in in advance, for such a large amount, and in addition to that they were quite expensive at that time; and I told him that I might be able to help him in that respect but couldn't tell him on that day, that I would tell him as quickly as possible. And then he went on to state that he had bought some chairs and needed more chairs. And he said that the boat had been in Government operation and hadn't been used since, so consequently she was stripped of many of the necessities and appurtenances that you normally find on vessels of this type.

(28)

The Court: Well, let me ask you: Was it necessary to have the chairs in order to get the certification?

The Witness: Well, your Honor, you would get your certification from the Coast Guard without chairs but you couldn't run your boat without them.

The Court: I am not talking about that. I am asking simply for certification.

The Witness: Yes, your Honor. Well, there were other items for certification; for example, the—well, primarily, it was life preservers, and then there were fire axes and fire extinguishers and various other items that are necessary for your Coast Guard inspection.

So I told him that the items that he would require to finish the vessel, that no doubt I would be in a very good position to secure them for him and I would let him know.

Q. Did you tell him from where you would secure them? A. Yes, I told him the Sandy Hook would not run and that I would discuss it with the principals involved with the Sandy Hook and see whether we could not get those items that were necessary for him; at a reduced rate. At this time

it was a large factor that these items would cost a huge sum of money, and Mr. Fuchs was concerned in that respect. However, he did tell me that he had to have life preservers to finish his inspection; that was mandatory; and he said that would be one of the first things that he would like to get as quickly as possible. Then I asked him what would
(29)
be the terms of his charter, how much he would expect.

Q. Pardon me, before you go into that: When you are talking about the inspection you are talking about a Coast Guard inspection. A. A Coast Guard inspection.

Q. And when you are talking about being certificated you mean the certificate from the Coast Guard authorizing the use of the boat. A. That's right.

Q. All right. A. So then I asked him how much, which was very important to us of course, how much would be the charter price for the vessel, and he said that he had expended quite a bit of money for a new Diesel and that he was looking for a good charter price and he said that he would ask for $400 a day for the vessel with the equipment, furnished with a Coast Guard certificate, ready to operate with the exception of crew and fuel, insurance, and wharfage, which I would supply. And I inspected the vessel, went around the vessel that day, and I left him and told him that I would let him know as quickly as possible about the items for him to complete his inspection.

Q. And what about the price and terms? What did you tell him about that? A. Well, on July 2d I told him that at that time that I could get these items—of course life
(30)
preservers at that time were high and they were hard to get, that I could get them at reasonable rates for him, at reduced rates; but I did not give him any prices at that time, because I hardly knew at that time whether it would not have cost me some money, and I made no bargain as to prices on that particular date.

Q. Now, did Mr. Fuchs indicate whether he knew about the Sandy Hook and what runs the Sandy Hook was making? A. Well, I assume Mr. Fuchs knew that. I mean I went over those runs with him.

Q. I see. Well, did he say anything to indicate whether he was familiar with the runs the Sandy Hook had been making in the past? A. Oh, yes. The boat business is a small business and I am sure he knew.

Q. Incidentally, how many years had the Sandy Hook—

The Court: Even I know that.

Mr. O'Brien: I move to strike the last part out.

The Court: What, mine or his?

Mr. O'Brien: The witness', your Honor.

Q. Well, as a matter of fact, Mr. Fuchs—

The Court: No, practically everybody knows about that run from the Battery to Sandy Hook, or to Atlantic Highlands.

Mr. Wittner: Mr. Fuchs admitted in his deposition—

The Court: All right.

(31)

Mr. Wittner: —that he knew about it.

The Court: Go ahead.

Q. How many years had the Sandy Hook been making that run?

The Court: What difference does it make?

Mr. Wittner: Well, It will be required to show experience later on anyway but for the moment I will skip it.

Q. Then what did you do after you left Mr. Fuchs? A. On July 2d?

Q. After July 2d, yes. A. Well, then I contacted my associates in Sandy Hook and I contacted the attorney for the race track, who were the first mortgage holders on the vessel, and also the attorney for—he in turn contacted Mr. Mangin, who was the attorney for the second mortgage, and they in turn had a meeting at court on, I think it was, the very next day, because this thing was crucial, and they informed me at that time that I could take these items from the Sandy Hook, that they would surrender these items to me, and it was presented to them in this light—that they at that time owed me considerable money and I said I would take—

Mr. O'Brien: I object to all that conversation, your Honor.

The Court: No, just let us know what happened.

Q. Well, that was in open court, was it? A. Yes.

Q. In the Referee's office? A. That's right.

(32)

Q. All right. You say the Sandy Hook owed you money at that time, or the corporation, or the—

The Court: Were you informed, in any event, that you could take these life preservers?

The Witness: I was informed that I could take these life—this equipment—without qualification.

The Court: What equipment?

The Witness: All these—I itemized the equipment that would be needed: 830 life preservers and so many chairs and the gangplank and fire axes and fire extinguishers, some line, and sundry, miscellaneous other items—brooms and mops and things, deck equipment and furniture.

Q. We will come back to the equipment a little bit later. Now after that did you have another meeting with Mr. Fuchs? A. Yes, I—

Q. Where did you meet with him? A. On board the Calvert again.

The Court: When was that?

The Witness: On July, after the 4th—on July 5th.

Q. Incidentally, I just want to get the name before the Court. You said you had talked with the lawyer for the Monmouth—Race Track Company, is it? What is the full name of that? A. Monmouth Park Jockey Club.

* * *

(33)

* * *

Q. Who was the lawyer for the Monmouth—Jockey Club, is it? A. Monmouth Park Jockey Club. Mr. Mermelstein.

Q. And is he the man you consulted about the equipment? A. He is one of the men, yes.

Q. All right. Now after July 2d what was the next time that you saw Mr. Fuchs? A. July 5th.

Q. And where did you see him? A. Aboard the Calvert.

Q. Who was with you at the time? A. Mr. Harry Lohman.

Q. Was he with you on July 2d also? A. Yes, he was with me on July 2d.

Q. Now will you tell the Court what talk you had with Mr. Fuchs on July 5th? A. Well, on July 5th, I told him that I could secure these items for him and I mentioned the prices to him, enumerated the prices for the various items, and told him that they could be delivered to him and that they would cost so much for each item, and asked

(34)

him if he was agreeable to pay that providing it met with his final inspection, and he concurred in that and said that it was all right, that he was very anxious to get them as

quickly as possible and how quickly could I get them aboard the Calvert. Well, he indicated—I told him they were out in Gravesend Bay on Sandy Hook and that he would have to send trucks for it out there and that would entail quite an operation, to move that quantity of equipment by truck, it would take quite a few trailer loads. So I suggested to him that if he wanted to, he could use the Motor Vessel Sunshine, which my brother operated, to move the equipment by boat, which would be more feasible, because the Sandy Hook was lying out 700 foot at the end of a dock which you could not traverse by truck, and the Calvert was lying in the yard, too, in the water, and—

The Court: This was at Gravesend, you say?
The Witness: Gravesend Bay, your Honor.

A. (Continuing)—and he thought that was an excellent suggestion. I told him that the boat was in operation daily; however, to charter it for a day to move the equipment and save money, rather than move it by trucks, and make it more convenient and get it quicker. And he agreed with that and he asked me how much we got for the Sunshine for a day and I told him well "I don't know how much my brother would ask for a charter but I am sure that on this particular occasion he would charge you a minimum". (35)

He was then making approximately five, six hundred dollars a day in the sightseeing business, and I had already discussed it with my brother and he said that he would be willing to do it on Sunday for $300, move this equipment.

So that was agreed on on that day.

Then we discussed the—we repeated the basic agreement that we had of $400 a day and we discussed the angles of insurance and I told him that I had contacted my broker and already had told him to arrange to place insurance on the Calvert for the amounts that we had specified at our initial meeting—

Q. What were those amounts? A. The amounts were seventy-five thousand hull and machinery policy and two hundred and fifty thousand P. and I.

The Court: What is P. and I.?

The Witness: Protection and indemnity.

A. (Continuing) And I had contacted my broker and he told me—

Q. Who was your broker? A. Despard & Company, 1 Cedar Street.

Q. And who was the particular person of that company you dealt with? A. Mr. Carl Dellenberger.

Q. Had that company placed insurance for you on other vessels in which you were interested? A. Yes, sir.

Q. And were they also the insurance brokers for the (36)
Monmouth Park Jockey Club? A. Yes, sir.

Mr. Dunham: I object, your Honor, as incompetent and irrelevant.

The Court: What difference does that make?

Mr. Wittner: All right.

The Court: You see, gentlemen, I wish you would just refrain from ornamentation of this. Just get right down to the heart of the matter.

Mr. Wittner: Well, I expect to call Mr. Dellenberger and—

The Court: I don't care—he might be the insurance agent for the Empire State Building. It makes no difference.

Q. Then after you told Mr. Fuchs what insurance you had arranged for, what else did you tell him? A. Well, then I told him what the various—

The Court: When did you tell him this?

The Witness: On July 5th, your Honor.

The Court: Well, you were on the boat. How did you get in touch with your insurance agents?

The Witness: Well, I did that between July 2d and July 5th.

The Court: Oh, you had already done that.

The Witness: Yes, your Honor. We had discussed insurance at our initial meeting and he had

(37)

told me, Mr. Fuchs,—I asked him what he wanted for hull and machinery and he said $75,000, so I called up Dellenberger of Despard the very next day and told him that we needed insurance in a hurry, to be ready to place it on the Calvert the minute that she was ready to move from the yard, a navigating hull and machinery policy and a P. and I. policy; and he told me if I gave him an hour's notice, that he could then issue the cover notes for Mr. Fuchs, either by phone or by messenger. So that, I had arranged previous to July 5th but I assured Mr. Fuchs that we had the insurance matter taken care of. And of course there was only one condition—that I told the insurance people that the vessel, Calvert, would be certified by the Coast Guard before she moved out of her berth.

Q. And when was the insurance to be delivered? A. The insurance would be delivered the minute that the Coast Guard certificate was obtained, so that we could then tell the insurance people that the vessel would navigate.

On July 5th I told Mr. Fuchs that the insurance had been arranged and I went over the various items with him and the prices of those items. Before we would move them I wanted to be certain that he was agreeable; and left him with the reservation that he could reject any of them; and

then the Coast Guard could reject any of the life preservers —if they weren't in A-1 condition they certainly would reject them.

So we discussed that very thoroughly that day, because (38)
these items were essential for the well-being of that vessel on a passenger run.

And we discussed several other items that we hadn't included in our first discussion, minor items. He had no paint on the vessel, and there were items of heaving lines and equipment for the ladies' room, which weren't there, facilities, and—in their general nature they were miscellaneous items but very important to the vessel. And at that time Mr. Fuchs told me that—I would be expected to furnish the crew of course from the outset but at that time Mr. Fuchs said "I have a new Diesel engine in this vessel and I don't want a cluck coming on the vessel and ruin my new Diesel. Therefore I think I should be entitled to a performance bond."

And I said to him, "Well, certainly; I have had experience in hiring crews and I would certainly not get anybody that would be a cluck, but I can appreciate your feelings, that you should have only the best engineer on here," because after all that is the heart of the whole boat, that new Diesel; and I told him I was then—I had an appointment with the Monmouth Park officials for this afternoon and that I had the appointment for 4 o'clock, and that I had to leave but I would call him in the evening; and I had an appointment with the board of directors of Monmouth, who were anxiously awaiting word that I had concluded this arrangement with—

Mr. O'Brien: I move to strike that part out.
(39)

The Court: I don't care about your Monmouth client. I am not interested in horse races.

Q. Is that what you told him? A. I told him that. That's why I had to leave the yard.

Q. All right. Well, then did you proceed to the Monmouth Park— A. Yes, I left the yard and went to Monmouth Park.

Q. All right. And the question of — A. I called him that evening; Mr. Fuchs.

Q. All right. After discussion with the officers of the Monmouth Park did you call Fuchs? A. Yes.

Q. What did you say to him? A. I told him that I had discussed this matter of his Diesel engine, which seemed to be an important matter with him, and which I agreed with him at the time that it should be important, and I said that "You will get a hull and machinery policy for any damage to your machinery, Despard completely covers that for anything outside of malicious damage or negligence but I said "to circumvent all this talk about the Diesel, why not put your own engineer on the Calvert?"

And Mr. Fuchs says "Yes, that's an excellent idea. I would be glad to put my own engineer on the Calvert."

And I said "By all means put him on and I will pay him his salary at the prevailing rate."

(40)

And that was agreed.

I said "Then it is understood that we have nothing further to do about performance bonds, Mr. Fuchs," and he said "That's all right. I'll put my engineer on. I'm satisfied."

Q. And then—I think you said that Sunday was the date fixed for delivery of the material? A. That's right.

Q. Now was it delivered on Sunday? A. Yes, sir, it was.

Q. Tell us then what happened on Sunday; how it was done and who did it. A. Well, I arranged on July 5th to meet with Mr. Fuchs on Sunday, July 8th to deliver this material to him, and I told him it would come by vessel

Sunshine, and I came with the vessel; I went over and helped load the equipment aboard the Sunshine and deliver it to the Bethlehem yard, and Mr. Fuchs was aboard the Calvert when I arrived with the material, and we transferred the material. I also brought a crew with me. Mr. Fuchs asked me to bring a crew on Sunday to expedite getting the boat inspected and get her ready for the inspectors on Monday and Tuesday. And I brought the crew and they transferred the merchandise from the Sunshine to the Calvert. Mr. Fuchs—

Q. Before you tell us that, tell us what crew you brought. A. I brought the captain—

(41)

Q. And his name is what? A. Captain Eldred Jenks.

Q. All right. Who else? A. A pilot—that was Captain Harry Quillan, and a chief mate, and unfortunately I don't have his name.

Q. All right. A. I have forgotten it. And then—

Q. And your brother—oh, excuse me. A—I brought three deckhands with me at that time, and my brother was with me, John, and myself, and a boatswain.

Q. Now when you pulled along the Sandy Hook who was on the Sandy Hook? Excuse me; I don't mean the Sandy Hook. The Calvert. A. Mr. Fuchs was on board the Calvert and a man whom he introduced as his brother-in-law, I believe.

Q. All right, sir. Now what was done with regard to the unloading from the Sunshine and loading on the Calvert? A. Well, several of the crew went aboard the Calvert with Mr. Fuchs and we stayed aboard the Sunshine and passed the material over to them on the Calvert, and Mr. Fuchs directed them where to put the materials and how to arrange them and stack them so they could be counted and inspected.

Q. Were they counted? A. Yes, sir.

Q. Was a record made of the count? A. Yes, sir.

(42)

Q. Tell us how that was done? A. I supplied Mr. Fuchs with a memorandum of the material that went over and amounts; and initially there had been some mistake in the amount of life preservers that were required, and after all had been counted, Mr. Fuchs informed me that he would need 100 more life preservers, and would the Sunshine make another trip to secure these hundred life preservers. Well, I said that I don't believe she could make the trip that day because it entailed most of the day to deliver the other material, that they could probably deliver them to him the next day, which I know was done.

Q. Was the rest of the material counted, the chairs and so forth? A. Yes, sir. They were all racked up in piles of—the life preservers were put in piles of 10 and the chairs were put in piles of 20.

Q. What else was taken? A. On board?

Q. What other material, yes. A. Well, there were 800—in total there were 700 and some odd life preservers at first but the extra brought it to 830.

Q. The extra hundred were brought when? A. Brought the following morning.

Q. The following day? A. I believe it was in the morn-

(43)

ing. I wasn't on that trip.

Q. Do you remember the number of life preservers, without referring to any memorandum? A. Yes, 830.

Q. And how many chairs? A. Six hundred and ten chairs.

Q. All right. Tell us about the other items. A. Well, then, two fire extinguishers that were put on aboard and there were several fire axes—I think two or three; I am not sure; the ladies' room equipment—that was composed of a settee, leather settee, and two armchairs and various dispensing units. And there was a new 9-fathom 8-inch

line put aboard which—there was lines necessary for the vessel. I asked Mr. Fuchs if he would like to buy the lines and he said he would. And they had no gangplank on the Calvert at all, no passenger gangplank whatsoever, and we had a unique plank, which I had discussed with him on a previous occasion—I showed him the plank and asked him if he would like to purchase the plank. He said he would. We mentioned the prices, we enumerated them, I put them down on a memorandum for him, and I handed it to him and he used the memorandum to check off the items.

In the deck equipment there was—I think there was about 40 gallons of paint in 5-gallon containers, and there was approximately 20 1-gallon cans, there were paint brushes, about a half dozen paint brushes, there were

(44)

scrapers, there were pails, mops, brooms, and there were pipe tools, which were personal tools of my own, 3-inch stock and die, 2-inch stock and die, 1-inch; there were—well, miscellaneous equipment which we put in one pile and we agreed on a price in total for the sundry items. We talked about the ladies' room equipment and we agreed on that at $200. We agreed on all this miscellaneous deck equipment at $500.00, and the aluminum plank at $750.

Q. You didn't mention the price for the chairs and the life preservers. A. The life preservers were fixed at $3.75 each for those that would be accepted and passed by Coast Guard.

Q. And what was the price of new ones at that time? A. New ones at that time, if you could get them would be about four seventy-five, five dollars.

Q. And how about the chairs? A. The chairs, we fixed a price of $2.80 for those chairs.

The Court: What was the lump sum agreed on for the—

The Witness: Deck equipment? Five Hundred dollars.

The Court: Five hundred dollars for the deck equipment.

Q. What was the price of new chairs? A. That type of chair, the price of a new chair would be approximately three-ninety, four dollars.

Q. Now have we now covered all of the items? A. Well, the rope—the rope was new, nine fathoms, and that would (45)
go according to weight, we agreed on that at $250.

Q. I don't believe you mentioned the price on the fire extinguishers. A. No, they were charged fire extinguishers, $15. each.

Q. And did you mention the price on the gangplank? I don't remember. A. Yes.

The Court: Yes.

A. Seven hundred and fifty dollars.

The Court: Seven hundred and fifty dollars for the aluminum gangplank.

Q. Now, some of that material came from the Sunshine? A. Some of it came from the Sunshine, yes, sir.

Q. You say a record was made and the count put down on paper? A. Yes, sir.

Q. What did you do with it? A. I gave it to Mr. Fuchs and he used it to check the equipment.

Q. Did he retain it? A. He retained it.

Q. Now, then, was anything said at this time, on the 5th, as to when the boat would be ready? A. Well, when they received these life preservers, Mr. Fuchs—

The Court: No, was there anything said at the time as to when it would be ready?

(46)

The Witness: Yes. There was only an approximation made of the time.

Q. What did Fuchs say? A. He said that the inspectors would be on board Monday to check the life preservers and to make the final inspections, with lifeboat drills and the various other inspections that were left open up to this date.

Q. Oh, I forgot to ask you: You said that Fuchs had asked you to bring a crew. What was done with the crew? A. The crew stayed aboard on Sunday. They posted their watches and they came aboard, the captain came aboard and he posted a watch for Sunday evening and the boatswain arranged the watch to stay on all night on the vessel.

Q. And the crew remained on the vessel. A. They remained on the vessel.

Q. Did you introduce Captain Jenks to Mr. Fuchs? A. Yes, I introduced Captain Jenks to Mr. Fuchs.

Q. What was done about the life preservers? A. Well, on Sunday when they were delivered, Mr. Fuchs got the stenciling apparatus for the Calvert out of the locker and got the crew together with himself and they stenciled the life preservers with the name "Calvert" on it to have it ready for the inspectors on Monday.

* * *

(47)

Q. Tell me, do you know whether the boat passed inspection on Monday or not? A. I know it didn't. I called the—

Q. Do you know what happened? A. Yes.

Q. What? A. I called the captain at the Bethlehem yard, Captain Jenks, and I asked if the boat would pass that day and he said no, that during a boat inspection with the Coast Guard present that one of the davits was defective and bent during the inspection and that the davit would

have to be replaced; so that would not be done, he told me, until the outside, the following day, the davit work. And then he told me that in addition to that, that they would still have to have their boat drills.

Q. Was the motor of the Calvert in good operation by July 5th or 8th? A. Well, no—it was practically but they were having some difficulty with the starting motor on July 5th. Mr. Fuchs told me that the Ingersoll-Rand engineer was expected that day to check on the starting engine, to find out what was defective so that they could remedy that.

Q. Now, then, when you were told on Monday that the inspection was not completed, did you go there on Tuesday? A. I called again on Tuesday, called the yard, and I did go—

Q. Did you come in person on Tuesday? A. I went there (48)
either Tuesday or Wednesday; it was either Tuesday or Wednesday, I don't recall which.

Q. Now with whom did you come?

The Court: Had it been accepted then?

The Witness: No. No, your Honor, there was no certificate, at any point during this.

Q. All right. What happened on the Tuesday or Wednesday? A. I drove out to the boat to see if I couldn't determine exactly when the certificate would be secured so that I could coordinate my own moves, to get the ads in the paper and various things that we had to do in relation to the track; and when I got out to the boat that particular day I met the captain first and I asked him whether the inspection was completed, and he says "No, it's not completed yet," that the davit had been replaced but they had not had a boat drill yet, and that there were several shorts in the inspection that had to be attended to, and that it would possibly be finished the following day. But on this

particular day Mr. Fuchs was there and I spoke with him and he told me at that time.

Q. All right. Tell us the talk you had with Fuchs on Tuesday or Wednesday. That would be the 10th or 11th, wouldn't it? A. That's right. After talking to the captain I asked Mr. Fuchs, I said "When do you think you will have your certificate of inspection?" and he hold me at that time that he was not going to go through with the deal, that he (49)

was sick, and that his wife had asked him to get away from the boats for the season, and that he was taking the boat out of the yard, that he was not going to run the boat that season at all. And I pointed out to him that he had made a deal with me and that we had this agreement in effect and that the boat was all ready except to get her final certificate, my crew was on there, the run was made to order; and he said "I'm sorry, I'm not going to go through with this deal at all."

And of course we, both of us, may have got a little demonstrative. I admit I did. There was a lot at stake as far as I was concerned. And he told me in the final analysis to get the crew, myself, the hell off the ship that day. He said he's a very nervous man and he is moving his boat. And I asked him "Do you want to pay for this equipment today? Do you want to pay for it now?"

He says "No, I'm moving the boat, I'm moving the equipment. It will be down in Perth Amboy on the boat; and if you want to collect for it, you can sue me for it."

Q. Then what happened? A. I called Captain Jenks over and I said "Captain, I don't know how much of this you heard but I'll repeat it to you." I said—

Mr. O'Brien: I object to all this.

Q. Well, was that in Fuchs' presence? A. Yes.

(50)

Q. All right. Tell us what you told the captain in Fuchs' presence. A. I told him—

The Court: Was Fuchs present when you told this to the Captain?

The Witness: Yes, your Honor.

The Court: All right.

A. I told the captain, I said "Mr. Fuchs is moving his boat, he is shutting off the sanitary facilities, he says he is removing the ship's papers, he tells me to get the crew the hell off the boat, he tells me that the gateman has got instructions to allow nobody on the Calvert; what do you want to do? You are the master of the vessel."

Captain Jenks said "Under those conditions I can't leave a crew on board this vessel; without any sanitary facilities, water, lights or anything else, I have no recourse but to take the crew off the boat."

The Court: Did he take the crew off?

The Witness: Yes, your Honor, he did.

Q. Was anything said about ship's papers? A. Mr. Fuchs said to me that he was taking the boat out of the yard and removing the ship's papers.

Q. Tell me, when on July 5th you and Mr. Fuchs had fixed the price on the material, was anything said as to about how it would be paid? A. Yes, we had discussed the

(51)

$400 a day charter price and I asked Mr. Fuchs how he would want his charter paid, and Mr. Fuchs said he would like some money in advance because he had expended quite a lot of money and he could use cash and he would want some money.

I said "How much money would you want in advance?"

He says "Oh, I would want at least ten days' to two weeks' charter money in advance."

So I said "Well, what will that come to?"

And he said "Well, in round figures, $5,000."

Well, I said "Now when you get this material, how do you expect to pay for it? Do you want to apply it to the charter, or do you want to pay cash, or how do you want to work it out?"

He says "Well, primarily I want to get $5,000 down payment. That I want because I can use that. And we'll arrange for the payment of the materials later; whether we apply it against the charter or not, or how we pay it, whether I pay it cash, we will discuss that."

Q. And it was left on that basis? A. It was left on that basis.

Q. Now on July 10th or 11th, that Tuesday or Wednesday, did you have $5,000 with you? A. Yes, sir, I did.

Q. Now, tell me, when did the race track season start? A. I believe it started on June 18th or 19th that year.

(52)

Q. And by this time the race track season had been in operation for some twenty days, or twenty-one. A. That's right.

Q. Now did you do anything about getting another boat? or was there one available? A. I tried, I had tried previously, I called up, I called up New England, checked on the Yankee up there, and checked on her speed, and she was too slow; and I called John Meseck of the Meseck Line to charter his vessel; he said no, he wouldn't charter his vessel but he would make the run under his own auspices.

Q. And did you recommend the Meseck then to the track people? A. I did recommend the Meseck to the track people.

Q. Meseck wanted to do it directly; he didn't want to charter it to you. A. He did it directly, he wouldn't charter it to me.

Q. So that you were out of business that year. A. I was out of business.

Testimony of Charles E. Gardner, Direct

Q. Now, you told us you had experience in operating vessels for this particular run. A. Yes.

Q. What was your experience in past years with regard to— I withdraw that for a minute. Had you had promulgated a price from New York to Atlantic Highlands? A. (53)
Yes.

Q. What price had been set? A. Two dollars and fifty cents round trip.

Q. And what was it in the preceding year? A. Two dollars in the year previous, and then back a few years prior to that it was a dollar and a half.

Q. What brought about the increase in 1951?

Mr. Dunham: I object, your Honor. I don't think it is relevant, what somebody raised the price for to go to the race track.

The Court: Well, was there any other comparable run?

The Witness: Yes, your Honor; the railroads went up. We always went up with the railroads.

The Court: No, no, a comparable ship line.

The Witness: No, we were the—

The Court: What did Meseck charge?

The Witness: He charged $2.05, I believe.

Q. Five? A. On excursion run, I think he charged $2.05 but he went to Rye Beach.

The Court: No, I mean what did Meseck charge—

The Witness: Oh, you mean Meseck for that season, your Honor?

The Court: Yes.

The Witness: Two dollars and fifty cents.

(54)

The Court: Two dollars and fifty cents.

The Witness: Yes, sir. Yes, your Honor.

Q. Now, how many passengers was the Calvert qualified to carry? A. Well, if she got her inspection certificate with the life preservers she would have been qualified to carry 1300, had she passed inspection.

Q. And from your experience what was your average number of passengers to the race track a day, average for the week?

Mr. Dunham: I object, your Honor. That is not binding on us. It is a different ship, different size ship, different steamship.

The Court: What?

Mr. Dunham: It's a different size ship entirely from the Calvert. I object to it as not binding on us, what some great big vessel like the Hook carried as comparing that to us, incidentally.

The Court: No, he said this carried 1300.

Mr. Dunham: The Calvert, but they are talking now about the Hook, the Sandy Hook.

The Court: No, I don't think he is talking about the Sandy Hook.

Mr. Wittner: I did say "What was your experience as to number of passengers the boat carried?"

Mr. Dunham: That would be the Sandy Hook then. He hadn't had experience on the Calvert.

(55)

Mr. Wittner: Yes, but if it was less than the Calvert could carry, —

The Court: Yes, I will hear it.

Q. Tell us, Mr. Gardner. A. Well, our experience was that she would average during the week days, with the exception of Saturday, about 800 passengers per day.

The Court: On that run.

The Witness: On that run, on the—

Q. To and from— A. The race track run.

Q. Well, tell us exactly how the boat would make that run, from New York to Atlantic Highlands. A. Well, it would run from New York City at around mid-day approximately and then make the race track run and—

The Court: How many other runs would it make a day?

The Witness: And then it would make a run up from Atlantic Highlands to New York with shore people going to New York, and then in between runs out of New York the commuter trip at 5:15—

The Court: How many runs a day?

The Witness: Two round trips on the regular runs, your Honor, and on those occasions when she had moonlight runs she would run an extra trip at night.

(56)

Q. Well, let me see, then. You had one round trip for the race track people. A. Yes.

Q. And in addition to that you had what? A. Round trips for the commuter people; for the shore people.

Q. So you had four runs a day. A. Yes.

Mr. O'Brien: Two runs.

The Court: Two runs a day.

The Witness: Two round trips.

The Court: Two round trips.

The Witness: Four trips.

Q. All right. And what was the —

The Court: What was the commuter average?

The Witness: About 240, your Honor.

Q. When you give us the average does that include Saturdays? A. That's one way, 240, it would be 480 in the

two trips. I don't know whether you want it on a round-trip basis.

Q. Oh, that's 240 each way?

The Court: That's 240 each way, you say?

The Witness: That's 240 each way, yes, your Honor.

The Court: Yes.

Q. I don't understand you. The 800 is what? Is that coming and going, a total 800, or 800 each way? Which is it? A. No, it would be 800 each way.

Q. Eight hundred each way. A. That's right.

(57)

Q. How many on Saturday? What's your experience there? A. Well, Saturday was always — our experience there was that Saturday was predominantly a sell-out. It would probably run — on an average Saturday's would run seventeen, eighteen hundred.

Q. And of course in the Calvert you only had capacity for 1300. A. We only had capacity for 1300, that's right.

The Court: How much longer do you expect to take with this witness? I am not trying to foreclose you; don't get that idea. I want to get an idea of—

Mr. Wittner: A half-hour would certainly cover it; maybe less.

The Court: All right. Then we will recess now until half-past one.

* * *

Q. Mr. Gardner, we were discussing the number of trips the boat was to make on that run for the track season; and how many days — you gave us the list of passengers and the charge but how many days do you figure for that? A. For the track runs?

Q. Yes. A. Well, based on the assumption that the

(58)

certificate would arrive on the 11th of the month or 12th, the morning of the 12th, that would bring 26 days, race track days.

Q. The rest is a matter of mathematics. Now in addition to the run from Atlantic Highlands to the Monmouth track — I mean from New York to Atlantic Highlands — you said you were also running charters. Now what charters have you got in mind, or did you have in mind? A. Well, there would be moonlight sails three nights a week, that would be for eight weeks; that would be three a week, that would be 24 moonlight sails.

Q. And how much a sail, a moonlight sail? A. Well, a conservative minimum would be about $1100 for a moonlight sail.

Q. Is that what you got while you were running the Sandy Hook? A. No, we got more for the Sandy Hook.

Q. More than eleven hundred? What did you get for the Sandy Hook? A. Well, in some cases we did get eleven hundred —

Mr. Dunham: I object, your Honor, about the Sandy Hook.

The Court: No, never mind the Sandy Hook.

Q. Now were there any other charters besides moonlight charters? A. Well, there would be Sunday charters —

(59)

The Court: Well, these are more or less speculative, it seems to me, unless you have something to indicate that they were regularly done, year in and year out.

Mr. Wittner: Yes sir. That's why I asked about the Sandy Hook, to show it was the regular situation. In fact, we have some figures on that.

The Court: All right.

Testimony of Charles E. Gardner, Direct

Q. Let me ask you: These charters you are talking about, did you have charters while you were operating the Sandy Hook for all the years you were operating? A. Yes, sir.

Mr. Wittner: Now I will submit —

The Court: Sunday charters?

The Witness: Yes, your Honor.

The Court: What would they run, about?

The Witness: On the Sandy Hook they would run about $2,000.

The Court: Well, on a boat this size.

The Witness: I would say $1500. We had some signed at $1500, for the Calvert.

Q. Well, we will go into that in a few minutes. First I want to establish the number of charters. Were there any day charters? A. Yes, there were 21 day charters arranged at that point.

(60)

Q. For what period? A. For the period from August 9th, after the track, until September 4th, Labor Day.

Q. And what were you getting for day charters? A. A minimum of $1100.

Q. Now, before we go into the expense and cost of operating, you said a minute ago you had charters signed up. A. Yes, sir.

Q. Incidentally, I think you said the Sandy Hook—you knew by June 19th, was it, that the Sandy Hook could not operate? A. Approximately; not definitely on the 19th but definitely on June 24th.

Q. All right. I show you a number of charters for the year 1950—

Mr. Dunham: Now, if your Honor pleases, before they are offered I have to object to all this 1950. It's a different ship entirely, and under different circumstances. I don't think they are binding on us. I

think they are incompetent, irrelevant and immaterial.

The Court: They might be indicative of the fact that there was a demand for charters. Now I don't know what the situation is in the harbor, how many ships were available for chartering, whether the Calvert would be the type that would be called upon for chartering under similar circumstances as these, but at least I will hear it so that I may have a basis

(61)

of comparison.

Q. Mr. Gardner, before I offer these charters or these contracts or orders for charters, tell me, were there any other boats operating this run to the track or—

The Court: Now these are charters aside from the track, aren't they?

Mr. Wittner: Yes, sir.

I mean were there any other boats—oh, excuse me: I missed up on that.

Q. I want to start with the point the Judge commented on. Where did these charters go to? So we can know whether there were other boats available for charter, and if so, what the demand was. Could you tell us about it? A. Moonlight sails, they sail on the Hudson River in the harbor; there is no particular scope to those charters; it depends on the time. Whereas the day charters, predominantly they have a definite destination in mind, and in the main they will go to Rye Beach or in some cases Bear Mountain. However, our charters were all destined for Rye Beach or they were simply sails.

Q. And what was the demand for such charters between July 1st and Labor Day? A. Well, the demand was terrific, especially after August—during the month of August—

because they were very few boats available during that period. It was just by coincidence that we would end our (62)
run on August 9th, whereas the other boats were committed for the entire season; so that we could be practically the only boat that would be available for chartering during August and the beginning of September.

The Court: Well, what about the other boats, the Meseck boats, for instance? What are they?

The Witness: The Rye Beach run, your Honor.

The Court: Rye Beach? On regular sailings?

The Witness: Yes, your Honor. And the Keansburg boats were committed to the Keansburg run; and the day line boats were committed to the Bear Mountain run up the Hudson River, but in certain instances they always had a boat available for a charter but they were booked out completely before the season started.

Q. Now, then, from your experience while operating the Sandy Hook, how many charters did you have a year, average? A. An average, we had 73 charters in 1950.

Q. I show you a number of cards. I haven't counted them; are they all for—I just want to check a few; they are all for 1950, I think. Well, you can tell better than I can (handing to the witness). A. No, these are—there are 73 cards here for 1950.

Q. They are in there? A. They are included in this bundle. There are other cards here, for other years.
(63)

Q. Well, take out the others, take out the 73 for 1950 so we can mark them for identification.

The Court: Well, do it later, do it later; don't stop now.

Mr. Wittner: All right.

The Court: Were those for the Sandy Hook?

The Witness: Yes, your Honor.

The Court: Now was that after its regular run had ceased?

The Witness: That's partly during its regular run, where she would be available for moonlight sails, chartered moonlights, and also after her regular runs.

Mr. Dunham: May I inquire, your Honor, is this the Sandy Hook you are speaking of?

The Court: Yes; yes.

Mr. Wittner: That's right.

Mr. Dunham: Wasn't she in bankruptcy then?

The Court: In 1950?

The Witness: No.

Mr. Dunham: In 1949.

The Witness: No, no, she was not. She was a debtor in possession operating, as an operating company.

Mr. Wittner: It wasn't adjudicated bankrupt until July 31, 1951.

The Witness: As a result of—

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Mr. Wittner: I have a certified or photostatic copy of a court order, which I will offer in evidence.

Q. Now for 1951 did you have a number of charters actually committed? A. Yes, we had a number of charters committed.

Q. Can you tell me how many?

The Court: That's for—

The Witness: For this season, for the Calvert.

The Court: For the new boat? What do you call it?

The Witness: For the M/V Calvert.

The Court: For the Calvert?

The Witness: Yes, your Honor.

The Court: Now how many charters did you have?

The Witness: Twenty-three charters, your Honor.

The Court: When did you get those?

The Witness: Some of them we got during the spring months of 1951, we chartered for the Sandy Hook and later transferred, notified them the Sandy Hook wouldn't run and substituted the Calvert, and some of them we got after we were negotiating with the Calvert people. So it would be from a period in about approximately February 1951 until July 10, 1951.

The Court: Well, how many did you actually have for the Calvert, not substituted for the Sandy Hook but how many directly for the Calvert?

The Witness: You mean eliminating the ones that had—

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The Court: I mean those that you engaged directly for the Calvert, not by way of substitution for the Sandy Hook.

The Witness: Well, we had, let's see—one, two, three, four, five, six, seven, eight, nine—nine I count here, your Honor.

Q. Now as to those that you say were substituted, how did you accomplish the substitution? A. Well, when it was determined that the Sandy Hook wouldn't make the run we notified the charter people, the people who had engaged the Sandy Hook for charter, and in some instances they couldn't use the Calvert because there were too many people going but where in those cases they could, they were glad to take the substitute boat.

Testimony of Charles E. Gardner, Direct

Q. And at what period of the season did you generally sign up these charters? A. Well, from—generally from February right on through. We did sign charters in July for September but usually they were all five to six weeks in advance, except in rare instances, where you had conventions or something of that type, where a convention comes into New York and they may decide on a boat ride you might get it over night; but it was generally six or seven weeks in advance.

Q. All right. Now the Calvert also had a bar, did it, and a dining room? A. No, it had a bar and a lunch counter arrangement.

(66)

Q. Was that the same as in the Sandy Hook? A. The Sandy Hook had a bar and a lunch counter and a dinning room.

Q. Did you operate the bar and the dining room yourself in the Sandy Hook or was that concessioned out? A. We had operated it on some—

Mr. Dunham: I object, your Honor, to income from the bar on the Sandy Hook. I mean it's so speculative, your Honor. How many people will buy drinks going to the track on the Hook? Here is a small boat of 1300. I have to submit I can't see where there is any analogy between the two. When they go down to the track, they want to spend their money and they are buying drinks. If they make money, then they spend it coming back.

The Court: And if they are going to the track they are a rather sporty crowd, aren't they?

Mr. Dunham: Yes.

The Court: And the other might be a very family-type crowd. I don't see any basis of comparison.

Mr. Wittner: Well, if he knows it from experience, and also what the income was. I am going to show our accountant's or bookkeeper's figures on that in a few minutes.

The Court: All right.

Q. How was that handled? Did you operate the bar and luncheonette or was that concessioned out? A. Well, in some earlier years we operated it but in the last—

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Q. In 1950. A. It was a concession.

Q. To whom? A. James Hill.

Q. And what arrangement did you make for 1951 for the Calvert? A. James Hill was to be the concessionaire.

Q. And what was he to pay?

The Court: Was it arranged for a set price?

The Witness: Yes, your Honor, on gross, on gross receipts; 25 per cent on bar and 20 per cent on food.

The Court: That you were to get—

The Witness: Yes, your Honor.

Q. All right. Now, then, have you got the exact figures for 1950 as to what the income was from each event? A. Yes, sir.

Q. Will you take them out? Have you got them in your bag? A. I think I have them here. Oh, you mean the exact figures.

Q. Yes, yes; I want to know exactly what the intake was for each month, for July and August. A. On food and bar.

Q. Well, if you have them separately give them to us separately.

The Court: Don't include the lunch room now.

The Witness: Just on the bar.

Testimony of Charles E. Gardner, Direct

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The Court: There was no lunch room on the—
The Witness: A lunch counter.
The Court: A lunch counter.
The Witness: Yes.

Q. Now so we will know, Mr. Gardner, what those figures before you mean, who prepared them? A. Nathan Schwartz, accountant, Brooklyn, New York.

Q. All right. A. He was the accountant for the debtor in possession.

Q. Is that broken down for the race track period and after the race track until Labor Day, those figures? A. It's broken down by month.

Q. By month, all right. What was your gross receipts for the run between New York and Atlantic Highlands for the month of July 1950? A. The gross bar receipts?

Mr. Dunham: I object, your Honor, as incompetent, irrelevant and immaterial in this case, not binding on us.

The Court: Well, it might go to the question of the loss that he suffered by reason of the failure of the owner of the Calvert to carry out a contract, if there was a contract.

Mr. Dunham: I don't want to argue this point—

The Court: He would be entitled to have considered the question of loss of profits.

Mr. Dunham: I don't want to argue this point, your Honor, if your Honor wants to rule that way,

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but if you had a similar vessel it would be one thing. Here you have the question of wages, you have the question of difference in wages of all these men on the Hook compared to the other one, the Calvert,

you have a different set-up entirely, and different times the vessels were supposed to run.

Mr. Wittner: I am going to—

Mr. Dunham: I submit there is no analogy between the two. I mean they are such different ships.

Mr. Wittner: I am going to show the difference in expenses for the vessels so we can get an exact picture and also—

The Court: You won't get an exact picture.

Mr. Wittner: Well, as exact as can be—

The Court: You will get an approximation that can be arrived at inferentially.

Mr. Wittner: Yes, as close as we can.

Also, so far as difference in capacity, he has testified as to what the capacities, respective capacities, were. They had the same—

The Court: It's too bad we coudn't determine the respective capacities of the passengers for their consumption of drinks.

All right, go ahead.

Q. Mr. Gardner, give us the gross receipts for the year 1950, for the month of July only. A. Well, I give you the

(70)

amount that the boat received—

The Court: From the bar?

The Witness: From the bar— this was 25 per cent of the gross.

Mr. Wittner: Yes.

Q. Oh, I see. That's your net income then, is it? A. There is $11,000 in round figures. That includes the bar and the lunch counter.

Q. And the lunch counter. A. That's right.

Testimony of Charles E. Gardner, Direct

The Court: Is there a breakdown for the bar?

The Witness: There were two bars on the Sandy Hook, your Honor. One was on the second deck, in the dining room, and one was on the main deck in the bar. Now the breakdown there would be, the main bar took in, well the profit was $7,500, so that would constitute 25 per cent of the gross. So four times that would be approximately thirty some odd thousand dollars, for the month of July.

Q. Well, in other words, the $7,500 was the net that you received from the concessionaire. A. That was the net that we received. That is the figures that we have here, only our net figures on the concessions.

Q. Yes? A. Then the other bar took in for the month of July $1,391—that was a little service bar that we had.

(71)

Q. Now which bar— how many bars did you have on the Calvert? A. One bar.

Q. How does that compare with each of these two bars that you told us about on the Sandy Hook? A. Well, the bar on the Calvert was a larger bar. We have small bars on the Sandy Hook.

Q. You mean you had two small ones compared to one large bar on the Calvert— A. That's right.

Q. —is that right? A. We had one large bar on the Calvert.

Q. All right. That was from the bar; and the lunch room or luncheonette? A. The lunch counter took in $3,389, as profit; that would be 20 per cent.

Q. That's your net. A. That's right.

Q. That you received from the concession. A. That's right. That would be about $16,000.

Q. Now what were the gross receipts—

The Court: How much was that?

The Witness: The lunch counter — the profit from the lunch counter was $3,389.

Q. And what were the gross receipts from tickets from New York to Atlantic Highlands during the month of July?

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A. The gross receipts were $78,532.10.

Q. Now, so as to be fair about it.—

The Court: Will you give me that again, please?

The Witness: $78,532.10, your Honor.

The Court: For July?

The Witness: July.

Q. From July 1st to July 31st. A. That's right.

The Court: All right.

Q. Well, since the Calvert was to begin approximately July 11th, then we should take one-third off that to arrive at approximately the figure—

The Court: Also the question of capacity would come in there.

Mr. Wittner: I beg your pardon, sir.

The Court: The question of capacity would come in.

Mr. Wittner: Well, he has testified already that during the—

The Court: I simply said the question of capacity would come in there, too.

Mr. Wittner: Yes.

Q. Well, your capacity for the Calvert was 1300 passengers. A. That's right.

Testimony of Charles E. Gardner, Direct

Q. Now, did you ever average 1300 for the Sandy Hook during a week? A. One day during a week we averaged

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more than 1300; that was on Saturday.

Q. On Saturday. A. Yes, that's right.

Q. But on week days. A. Week days our average was 800.

Q. Then to allow for the difference in Saturday, I think you have already testified that Saturdays you might run up to 1700 on the Sandy Hook. A. As an average, yes.

Q. And here your capacity was 1300. A. That is right.

Q. So that would be the difference between the two, the receipts from the two boats. All right. Now what were your gross receipts for the month of August? and give it to us in the same order you did before—from the bar, lunch counter, and then tickets. A. The bar was—I am giving you round figures; is that quite all right.

Q. Well, whatever figures you have. A. Fifty-five-hundred—well, I am combining the two bar figures.

Q. Oh, I see. A. It's $5500. And the lunch counter figure for August was $1232.

Q. That's your net. A. That's our profit.

(74)

Q. Profit. That you received from the concessionaire. A. That's right.

Q. All right. Now what are your gross ticket sales during the month of August? A. $46,979.50.

Q. Now in 1950—

The Court: How much?

The Witness: $46,979.50.

Q. Now in 1950, when did the track season end? A. August 9th.

Q. August 9th. A. No, August 8th.

Q. The same as in 1951 then. A. Oh. No, August 9th in 1950.

Q. All right. Now have you got a record of charters in that report for 1950? A. Yes, sir.

Q. What charters did you have for the month of July in 1950? A. In dollars and cents we had $9,322 for July, for August there was $11,147.72; and for September $9,354.50.

The Court: Nine thousand—?

The Witness: $9,354.50.

Q. Now were you planning any change for 1951 so far as—

(75)

The Court: I think we had better have something about the operating expenses now.

Mr. Wittner: All right, your Honor.

Q. What would you estimate to be your operating expenses for the Calvert a day? A. Well, first you would have a four hundred dollar charter fee.

Q. Right. A. And your crew, your fuel, wharfage—

The Court: Well, I wouldn't know what that would be.

The Witness: Would you like me to break it down, your Honor?

The Court: I would.

The Witness: All right. Crew, operating crew expenses, and this would be exclusive of the steward's department because the concessionaire would pay them, operating crew expense would be approximately $140.

The Court: Fuel?

The Witness: Fuel would be approximately $60. Wharfage would be approximately $26.

Insurance for that period of time would be approximately $36.

And then you would have certain miscellaneous items that are bound to occur. I would say a safe leeway would be $25 for miscellaneous—linesmen that you carry occasionally to catch a line, and casual expense, $25 a day would be a good estimate.

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Mr. Wittner: Which makes a total, I haven't got all those figures down, your Honor, but it makes a total of approximately $300 a day?

The Court: It would be about $687.

Mr. Wittner: For both crew and charter.

The Court: For the whole expenses he has listed.

Mr. Wittner: All right.

Mr. Dunham: Now, your Honor, if I might make one more objection as to that, this vessel hadn't been operated since the war, and I say that there is no way that this man could sit there and estimate how much operating that ship would cost. It had never been operated in this connection, and I think that his testimony is a mere guess and it's too speculative for your Honor to consider in connection with this case.

The Court: Well, the charter is not speculative.

Mr. Dunham: No.

The Court: The crew wouldn't be speculative.

Mr. Dunham: Yes, it would, your Honor. That's the trouble. Because they have these labor relations troubles and one year you cannot break down because of certain daily rate, and the next year you can't operate at all because the rate has been greatly increased.

The Court: Well, was there any trouble in the harbor about change of pay during this period?

Testimony of Charles E. Gardner, Direct

The Witness: Your Honor, we— inland waters never enter into, and seasonal work, we never had
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any trouble in that respect. I never did, never anticipated any, and they didn't have any that season. And these rates of pay that I am quoting here are higher than they would pay normally on the Calvert.

Mr. Dunham: If I might make an observation, this man (indicating) operated the Thames River line a certain summer—

The Court: What?

Mr. Dunham: This man here operated the Thames River line a certain summer and he couldn't operate it the next year because of the great increase in men's wages.

Mr. Wittner: Was that in London, you mean, the Thames River? in England?

The Court: Well, I have asked him if there was any labor change in this period and he said no, in inland waters there was none.

Mr. Dunham: Well, I still say it is speculative, to say what this ship could have done in some other year.

The Court: Well, I think it is sufficiently factual to be able to base a fairly decent inference on the cost.

Q. Mr. Gardner, were there fixed scales for crews? A. No, not in inland waters but I paid my crew on a scale that was comparable with the fixed scale that was in the inland waters. Some marine operators did not pay as much; I know that.

Mr. O'Brien: Well, I will put an objection to this.

(78)

Testimony of Charles E. Gardner, Direct

Q. How many members would there be in the crew on the Calvert? How do you fix that? A. Well, of course—I am quoting Mr. Fuchs now and from my own judgment I could tell you within one more or less how many would be there.

Q. Yes. A. But Mr. Fuchs told me that there would be eight men in the operating crew for the summer season, inland waters, and I would say at the outside I would add one to that, I would feel better myself if we had nine in the crew—I have reasons for that of my own. But the operating crew would consist of nine men.

• • •

Q. What was the scale of pay for this crew? A. Well, it was compatible with the—

The Court: What was it?

Q. I mean how much for each man. A. Oh, for each man individually?

Q. Yes. A. Well, the captain got $20 a day, and the pilot he would get $16 a day; the chief engineer was going to be furnished by Mr. Fuchs, he would normally get something comparable to the captain's wage so I would assume that would be $20 a day there; and the mate would get approximately $15 a day; and you have one oiler in the engine room and his rate would be about $14 a day; and

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four deckhands, they got the least of all, they would rate about $9 or $10 a day for a deckhand.

Q. All right. Now what kind of engine— I think you have already told us the Calvert had a Diesel engine. A. That's right.

Q. And how many gallons of oil would you estimate, fuel oil? A. Well, my estimate in that case would be purely

conjecture. I can only estimate; what that ship would use I wouldn't know definitely, I can only compare it with other ships, never having seen the Calvert in operation with her new Diesel.

Q. I understand, but having seen other boats— A. Other Diesel vessels--?

Q. Yes. A. —of comparable horsepower? I would say in the neighborhood of, oh, about $60 worth of Diesel oil.

Q. All right.

The Court: Wouldn't that depend on the number of trips and the mileage?

The Witness: Yes, your Honor, it would. This is computing it on a 13-hour daily basis. That's what we term a half-day, in the marine business, 13 hours.

Q. So you compute it on that basis, do you? A. On that basis.

Q. All right. I think that covers the expense item.

(80)

Now I forgot to ask you just one thing: In the opening statement counsel for Fuchs and the Sound Steamship Lines said something about a proposed contract. Was any proposed contract tendered to you by Mr. Fuchs? A. Yes, there was a form of contract that was tendered to me on July 8th on the Sunday that I delivered the merchandise.

Mr. O'Brien: I didn't get the date.
Mr. Wittner: July 8th.
The Witness: July 8th.

Q. Now what did you do? And tell us what was said. A. I looked at the contract and I immediately could determine from several of the items in there that it didn't apply to me, and I informed Mr. Fuchs, I said "Well this contract

doesn't embrace the points we were talking about and it looks foreign to our contract," and he said "Well, this is a form, another form of contract, that I was going to use in another instance, but do you approve of it as to form?" and I said "No, I would rather have you draw one up just embracing the agreements that we have, the facts that we have agreed on, and embody that in a contract," and he took the contract back at that time and told me he would draw up a new one.

Q. Did he ever submit to you a redrawn contract? A. No, he never submitted—

Q. Or another contract? A. —another contract to me.

Mr. Wittner: That's all.

(105)

Cross-Examination by Mr. Dunham:

Q. Now, Mr. Gardner, let your mind, if you will, go back to the early part of June 1951. Will you tell us whether or not you negotiated with Mr. Fuchs about June 7th? A. No, I don't believe I negotiated with Mr. Fuchs at that time.

Q. You don't believe you did. A. I am quite certain I didn't. You mean relative to the chartering of the Calvert.

The Court: Yes.

Q. That's what all this is about, Mr. Gardner. A. Well, I may have talked to him on the phone but—

Q. You went aboard the ship, didn't you? A. June—

Q. Down at the Bethlehem Shipyard over in Staten Island. A. It's possible, Mr. Dunham, that I could have.

Q. Yes. A. Yes, sir, it is possible. I don't remember it though.

Q. And would you say that it is possible that your first negotiation started on the vessel on June 7, 1951? A. Well, that I can say would be impossible.

Q. Now, at that time, as I understand it, you did not know Mr. Fuchs very well except you had been on one of his vessels in 1950; is that right? Do you recall that? A. That's right; I was on a vessel in 1950.

Q. And other than that you didn't know each other

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whatsoever; right? Not at all. A. No, we didn't know each other intimately.

Q. No. A. That's right.

Q. But in 1950 you went down and introduced yourself and talked about a boat, so when you went back in '51 you recognized each other; you recognized him, didn't you? A. When I seen him in '51 I did recognize him.

Q. Yes. A. Yes, sir.

Q. Now let's go on to June 15th. Do you have any recollection of going down there again and talking with him on June 15th? A. That's quite possible, that I was there on June 15th, around that period; not exactly on June 15th but somewhere in that period I must have either talked to him on the phone or stopped at the yard, that's quite true.

Q. Is it true that you just drove in with your car? A. Well, no, I don't think that's true because I didn't have a car.

Q. Didn't Lohman have a car? A. Lohman had a car, yes.

Q. Do you remember his license number? A. No.

Q. Would you say that you rode in on the 7th or the 15th

(107)

in Mr. Lohman's car? A. I don't believe I did, Mr. Dunham. I have no recollection of being there on the 7th.

Q. Well, when you go in there you have to check in some way, do you not? A. That's right, sir.

Q. And when you go in with a car they take your license number, do they not? A. That's right, sir.

Q. You are familiar with that. A. Usually they do, yes.

Q. Yes. And when you walk in you go in another entrance, is that right? A. Well, it all embraces one entrance there. There is a gateman and there is a place for these cars to come in the same entrance.

Q. And you sign a register. A. Unless they know you you will sign the register.

Q. And you tell them what your mission is. A. That's right.

Q. And that's what you did on these occasions, no doubt, isn't that right? A. If I was there that's what I would have done, normally.

Q. Yes. Now let's go on to June 20th. I know it's four or five years ago but can you set your mind as to the 20th

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and recall having gone down there and talked to Mr. Fuchs? A. On June 20th? That's possible, that I was there, but I don't recall it. I know that it was between—somewhere in that period that I discussed but about the exact date at that time I don't know.

Q. Now it is our contention, Mr. Gardner, that at that time Mr. Fuchs handed you this proposed charter party.

Mr. Wittner: Just a minute, please. We are not interested in—

Mr. Dunham: May I finish the question?

Mr. Wittner: Just a minute. —in respondent's contentions. Counsel tells Mr. Gardner "It's our contention" and I don't think we are interested in what their contention is.

The Court: I think he said—

Mr. Dunham: May I finish the question?

The Court: Go ahead, finish your question.

Q. I show you a charter party, which we say was handed to you that day. I want to show you the charter party. Isn't that a fair question?

The Court: Have you seen that before?

Mr. Dunham: Yes, he has testified—

The Court: Now just a moment, please.

Mr. Wittner: Now wait a minute, Mr. Dunham. He didn't testify—

The Court: You know, I am going to say this:—

(109)

Mr. Wittner: Oh, I am sorry.

The Court: I am going to say this to you lawyers and I hope you will remember it: When I ask a question of lawyers I expect a direct answer from them; when I ask it from a witness I hope to get a direct answer. But when I am talking no one else will talk.

Mr. Dunham: I will do my very best, your Honor.

The Court: I know that lawyers, in their zeal,—I have been a practicing lawyer myself and I have been guilty many times, I dare say, but we will try to preserve that regulation.

Now have you seen that before?

The Witness: Your Honor, I have seen—

The Court: Yes or no.

The Witness: Yes.

The Court: All right. When and where?

The Witness: When we were taking depositions in I think it was Brooklyn, New York, depositions for—

The Court: Did you ever see it before that?

The Witness: No, your Honor.

The Court: All right.

Do you want that marked for identification?

Mr. Dunham: Yes, if your Honor please.

The Court: All right, mark it for identification.

The Clerk: This exhibit is marked Respondent's 1 for identification.

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Q. Well, is it true then, Mr. Gardner, that the charter party or the charter, the bare boat charter, that was extended to you at that time had on it "Sound Steamship lines, Inc.," a letter?

The Court: At what time?

Q. At the time that a charter was shown to you, a charter party, a proposed charter party.

Mr. Wittner: Well, I object to that, your Honor. The witness says he has not seen it except in the depositions.

The Court: No, he said *a* charter party.

Mr. Wittner: Oh.

The Court: *A* charter party.

Mr. Dunham: He specified, you know, he did.

The Court: *A* charter party.

Mr. Wittner: Oh, that's another document.

The Court: All right; proceed.

Q. Now this exhibit which I have shown you, Respondent's Exhibit 1, it is on the letterhead of Sound Steamship Lines, have you seen such a proposed charter party at any time? A. I have seen a charter party with Sound Steamship Lines' stationery, yes.

Q. Yes. A. Yes, I have.

Q. And you so testified in your examination before trial. A. That is right, sir.

Q. And didn't you say that that one was handed to you

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at that time? A. That was handed to me on July 8th; not this one but one on Sound Steamship Lines' stationery.

Q. Yes. Well,— A. That is right.

Q. May I call to your attention that this is on Sound Steamship Lines' stationery? A. Yes, it is.

Q. Do you feel that there is a difference between this and the one that Mr. Fuchs handed you— A. Yes.

Q. —at the shipyard? A. Yes, I know there is a difference.

Q. Can you describe the one that he handed you at the shipyard? First may we say that it was on Sound Steamship Lines' stationery? Right? A. That's right, sir.

Q. And was it white paper? A. Yes, it was white paper.

Q. Did it have typewriting on it? A. Yes, it had typewriting on it. Q. Did it mention about a bare boat charter? A. No.

Q. Did it mention about insurance? A. Well, I examined it—I just gave it a cursory examination, There were

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six or seven pages, and when I seen it didn't apply to my particular case I gave it back to him; but I do recall it did mention insurance. Now I can't be too particular about—only specific instances that I noted were at variance with what we had talked about.

Q. Then you had, prior to Mr. Fuchs handing you this proposed charter, or whatever you care to call it, there had been discussion about various arrangements, such as insurance and the price, isn't that right? A. That is right, sir.

Q. And you had discussion about this hull insurance? A. Yes, sir.

Q. And a performance bond? A. Yes, we discussed that briefly.

Q. And would you say that that discussion was on the first day or the second day you talked to him? A. Oh, I can fix that date exactly.

Q. All right. A. The date that we discussed about the performance bond? Is that what you are referring to, sir?

Q. Yes, and insurance and anything— A. Well, the insurance was talked about on July 2d, the hull insurance and the—because it was at that time that I called my insurance broker; so I can fix that date.

The Court: The hull insurance and the P. and I.?

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The Witness: And the P. and I.,—as a result of the meeting on July 2d; and the performance bond was definitely talked about on July 5th, and I know that from another association because I called Mr. Fuchs about the same thing that night after I visited at the track and the matter was discussed at the track, so I can fix that date.

Q. At these discussions, we'll say between June 7th and July 10th, make it all-embrasive, if we may, then you had discussion isn't it true, about what you were going to do in getting this boat for the summer, or for this race track season?

Mr. Wittner: I don't understand that question at all because they had discussions from earlier—

Mr. Dunham: All right, then I'll call it more explicit.

Q. The things you were going to do, isn't it true, were P. and I. insurance, hull insurance, and you were going to check all the perishable stores, like what you used, lube oil, isn't that true? A. Well, that would come after the Coast Guard certificate of inspection, of course. That would be my end of it, yes.

Q. Yes: A. Insurance, check the lube oil, take inventory, hire the crew; that's right, sir.

Q. Inventory. A. And pay the charter fee.

Q. Yes. A. That's right.

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The Court: But that would be only after the—

The Witness: On receipt of the Coast Guard certificate, to know that we would run.

The Court: And your acceptance of the charter.

The Witness: Yes, your Honor.

Q. You put the men on, you put men on there you said in your testimony before. A. Yes, there was a crew on there, with the exception of the chief engineer, who Mr. Fuchs was going to put on.

Q. And you had three deckhands, did you not? A. Three deckhands and a boatswain. That would make four deckhands.

Q. Yes. And you had a captain and a pilot. A. That is right, sir.

Q. And perhaps a mate? A. A mate and also an oiler.

Q. How about a watchman? A. Well, one of the deck crew constituted the watch for the night.

Q. Now that was in accordance with the negotiation arrangement which you had with Mr. Fuchs, wasn't it? A. No, that was at the request of Mr. Fuchs on July 8th; he asked me to take over the vessel on July 8th so I had to put a crew on there.

Q. Didn't he say that the vessel has no crew and "I have

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no crew for it"? A. No, he asked me to bring a crew for the vessel. After all, they were going through a Coast Guard inspection. Certainly you can't go through that without a crew.

Q. Then you had to put the crew on before he could have the Coast Guard inspection, didn't you? A. We had

to bring the crew over to the vessel at his request so he could have it, or else he would have to supply his own crew; it was one or the other.

Q. And you knew he had no men for it, didn't you? A. That's right.

Q. It was a dead vessel. A. Well, it wasn't exactly dead but—

Q. Well, it had no men aboard. A. Oh, he had—he was aboard himself and he had other men working on the vessel.

Q. Those were the vessel men, weren't they? A. Presumably they were, Mr. Dunham. I don't know, I am sure.

Q. Yes. The vessel men were in the repair yard. A. Yes.

Q. And the vessel men were doing the repairs. A. But she wasn't in dead storage.

Q. I don't mean dead storage but a dead vessel. A. Yes, she wasn't running; she didn't—

Q. She didn't even have a skeleton crew, did she? A. No crew on to speak of, no.

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Q. No, and you are familiar with the rule that the tugboat can bring her in there without any crew whatever, aren't you?

Mr. Wittner: I object to that. I don't know what relevancy it has.

The Court: Well, there was no crew on there anyway.

The Witness: That's right, sir.

Q. Yes. And so by request or arrangement you put your men on. A. That is right, I put my men on on that Sunday. Mr. Fuchs asked me on Friday before that to bring a crew aboard.

Q. And the crew had to be put on before the Coast Guard inspection, Coast Guard run. A. Well, it was either that or get the men in the yard to fill in in the boat drills.

Q. And that was your arrangement, to put the members of the crew on there. A. It was Mr. Fuchs' arrangement.

Q. Yes. A. He asked me to do it and I did it.

Q. Now we go to July 6th. Do you recall being on there at that time? A. July 6th.

Q. Yes. A. No, I don't recall being on there on July 6th.

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Q. How about July 7th? That was on a Saturday. A. July 7th. No, I don't recall that either, Mr. Dunham.

Q. Wasn't that the day that you started talking about life preservers and chairs and all that? A. Oh, no. Oh, no. We talked about that long before that.

Q. Long before that? A. Yes. On July 2d.

Q. Oh. Then your main date here is July 2d; everything was done on July 2d. Is that right? A. No, that's when I started talking seriously with Mr. Fuchs.

Q. But you think now you did talk to him on June 15th or perhaps June 20th? A. I either talked to him at the yard or by phone. I did definitely talk to him prior to July 2d, to ask him if the boat would be available.

Q. And wasn't there a good deal of discussion about all that you were required to do, like the insurance certificates, the notes that you were to give him, that the broker gets for you? Despard? A. To cover the hull?

Q. To cover the hull? A. Yes.

Q. And also about the money to be paid, $11,200? A. No, we didn't discuss that at all, Mr. Dunham; not a figure of $11,000. That would be inconsistent. After all, I can't

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associate this $11,000. I don't know what you mean by that. I don't recall a figure of $11,000 at all.

Q. Eleven thousand two hundred. A. Well, certainly that doesn't add up for the charter period. After all, I mean if its $400 a day from say even if the charter could start on July 11th till September 4th it would certainly be more than $11,000.

Q. Well, didn't you want it for 28 days? A. No, I wanted the charter for—why would I want a boat for 28 days?

The Court: No, no,—

A. (Continuing) I wanted it from the date that we would get a Coast Guard Certificate until Labor Day, for the season.

Q. Well, weren't all your discussions about 28 days at $400 a day? A. Oh, no.

Q. You deny that? A. I certainly do deny that.

Q. All right; all right. A. That only embraced the race track run, the 28 days.

Q. Now you say that your discussion about bringing gear aboard was on July 2d; right? A. No, July 2d Mr. Fuchs told me what he needed and I told him I would ascertain whether I could procure it and let him know as quickly as possible, so that was on July 5th that I let him know I could get these various items and sell them to him.

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Q. You deny, do you not, that you made the offer to bring all this gear aboard? Isn't that right?

Mr. Wittner: That's very vague

The Court: What was that please? Read that.

Q. (Read by the Reporter.)

Mr. Wittner: Well, he did bring it aboard.

Mr. Dunham: All right.

Mr. Wittner: The question is on what terms.

The Court: No, he has testified already that he brought the material on board at the request of Mr. Fuchs.

Mr. Dunham: That's the reason I asked him if he denied he brought it, of his own volunteer proposition, put it aboard.

The Court: That isn't the question you asked. If you put it that way I will permit him to answer.

Was it of your own volition that you brought these things on board?

The Witness: No, Mr. Fuchs had asked me to see if I could get the material for him, or else I wouldn't have known he needed it, if he hadn't told me.

Q. Now the gangplank, you didn't get that from the Hook, did you? A. Yes, I got the gangplank from the Hook.

Q. The aluminum gangplank? A. Yes.

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Q. What did you bring from the Sunshine? A. Oh, various paints, some tools, some mattresses and blankets and mops and brooms, and pails, soaps.

Q. Did you and your brother own that? A. Yes, we owned it.

Q. Now at the same time you were negotiating for another vessel, were you not?

Mr. Wittner: I object to that, your Honor. It is immaterial as to this vessel.

Mr. Dunham: I say it is important, your Honor.

The Court: It may be material as to whether or not there was an actual charter, oral charter.

Mr. Dunham: It is highly important, your Honor.

The Court: For this particular vessel. Go ahead.

Q. You were negotiating for the Dolphin from Jacksonville, weren't you? A. That's right. I was negotiating relative to the Dolphin, that's right, sir.

Q. Yes. And do you know her capacity? A. Yes, I do.

Q. What is it? A. Three hundred and thirty-eight.

Q. Well, now, at the time you were talking to Mr. Fuchs

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did you tell him that you were negotiating for the Dolphin? A. I believe I may have in conversation, yes, sir.

Q. And you wanted that for an additional vessel, didn't you? A. We had some plans for the Dolphin, yes. We were going to use that to some extent.

Q. And you finally brought it up here, didn't you? A. The Dolphin? I didn't bring it up personally but the Dolphin arrived in New York, yes, finally.

Q. Well, weren't you instrumental in bringing it up? A. I was instrumental in bringing it up.

Q. Did your brother bring it up? A. No, my brother didn't bring it up. My brother was on another vessel at that time.

Q. Then when you brought it up here you put it in some shipyard, did you not? A. When it arrived here the owners advised the vessel to be put in a shipyard and it eventually went into the Beth —

The Court: Had you chartered it?

The Witness: I had worked out an arrangement with some restaurant men from Pittsburgh. They were stranded in Jacksonville, Florida, your Honor, with this vessel and they couldn't get it out of Florida, and I attempted to bring it up here and to put it in service, because they were losing their vessel; and

when it finally arrived in New York, the vessel was in a sinking condition, we had to get it to the yard immediately. It went to the Bethlehem yard.

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Q. Did you put a lien on it? A. Yes, I did.

Q. How much?

Mr. Wittner: Well, that's objected to. Are we now going to litigate something else?

The Court: What is the purpose of the question?

Mr. Dunham: Well, that is the reason, one of the reasons, for the performance bond, because at the same time he was negotiating for this he was negotiating for another vessel.

The Court: Well, he has testified there was a discussion about a performance bond but as I recall, his reason was because Mr. Fuchs said that he had new Diesel engines and he didn't want — what was the term?

The Witness: He didn't want a cluck on it.

The Court: A cluck. Now you say it was because of something else?

Mr. Dunham: Well, I will say, your Honor, that I will have expert testimony that a performance bond has nothing to do with the engine whatsoever. The performance bond is to keep him from letting the vessel get stranded and hit docks and have claims against the owner.

The Court: All right, he has testified to what the performance bond was according to him. Now if you are going produce expert testimony, all right.

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Mr. Dunham: Yes, to show your honor the purpose of a performance bond and what it is all about.

The Court: All right. All right.

Mr. Dunham: It's diametrically opposed to what he is saying, and I have to tell your Honor that.

The Court: All right.

Mr. Wittner: I might say, however, I don't see how an expert can say what their agreement was.

Q. Now, may we carry through for these different discussions and negotiations? We have it up to July 2d, 7th, 8th; do you recall the 9th being down there, with California Captain Jenks? A. The 9th I was not at the Bethlehem yard. On July 9th I was not there.

Q. It was on a Monday, wasn't it? A. I was not there. I called the yard up.

Q. Yes, you called Captain Jenks up. A. Yes.

Q. And that was the day you were supposed to bring the money down, wasn't it? A. No; no, I wasn't supposed to bring the money until your Coast Guard certificate was on the boat, so we would know we were going to sail.

Q. Now, didn't you call up Captain Jenks and ask him to tell Mr. Fuchs that you wouldn't be down that night? A. I called Captain Jenks—would you like me to tell you why I called him? Can I?

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The Court: No, the question is whether you called him for that purpose, to tell him that you would not be down that night. A. I didn't call him for that purpose, your Honor, but I did tell him to tell Mr. Fuchs I won't be over today; that's true.

The Court: All right.

Q. Now wasn't it on the—say the 7th, and that was—A. Saturday.

Q. On a Saturday—that you talked with Mr. Fuchs about paying him the money? A. I am quite certain I didn't, Mr. Dunham.

Q. You deny it. A. Not July 7th, on a Saturday.

Q. You deny it. A. I said to the best of my recollection I didn't talk to him on July 7th.

Q. Did you have discussion—

The Court: What is your recollection as to the first time you talked to him about giving him this $5,000?

The Witness: On July 5th, your Honor.

Q. Did you have discussion with Mr. Fuchs about a certified check for $11,200? A. No, Mr. Dunham; no.

Q. Didn't you ask him if he would take anything except a certified check because it was Friday, the banks were

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closed until Monday? Do you recall that? A. No; no. I never said such a thing.

Q. Didn't he tell you that he would take something besides a certified check and that was cash? Do you recall that? A. No, sir. He never said it.

Q. Now, when do you say was the first date that he asked you for money for this boat? A. Well, he didn't ask me for money. He asked me that when the Coast Guard certificate was delivered, that I would give him a down payment on the charter, and we discussed that on July 5th. The first day that he talked about charter price was on July 2d. That was fixed at $400 a day; and he told me at that time that he would like some money in advance.

Q. That was July 2d? A. That's right.

Q. You mean you hadn't discussed the price before July 2d at all. A. I couldn't have. I wasn't even here. I was in Florida.

Q. Before July 2d you were in Florida? A. I couldn't have.

Q. You came back from Florida on July 2d? A. That's right.

Q. And how long had you been in Florida? A. Well, I had been in Florida since June 24th.

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Q. In connection with the Dolphin? A. That's right.

Q. Now, do you recall what day of the week July 2d was? A. No, I don't off hand but I can fix it, I think. I think it must have been a Monday. July 8th was—

Q. Well, we will say Monday was the 9th. The 2d would have been a Monday. A. I guess it would be. The 8th was a Sunday.

The Court: The 8th was a Sunday?

The Witness: Yes, your Honor.

The Court: Then the 2d was a Monday.

The Witness: It was Monday. I think it was Monday.

Q. The 2d was Monday. Did you come back from Florida on Sunday? A. No, I think I came back that day. If I am not mistaken I came back that morning.

Q. And you went to the Bethlehem that afternoon? A. Yes.

Q. Did you talk with Mr. Mermelstein before you went? A. I talked to Mr. Mermelstein from Florida.

Q. While you were in Florida? A. That's right.

Q. Was he down there? A. No, he was up at Monmouth Park.

Q. You talked to him on the telephone? A. I did.

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Q. And before you went away did you talk to him and get the go ahead about getting them a boat? A. Pardon me? I didn't understand you.

Q. Before you went to Florida did you get instructions from Mr. Mermelstein to get a vessel, a boat, for the race

track? A. He told me to do everything I could to get one, yes, sir.

Q. Well, when did you know that the Hook was going to be laid up by the Coast Guard? A. That became pretty evident about the 22d, 23d of June, about that period; because we still had hopes on June 15th, I know, and we had no hopes on June 24th; so it was in that period.

Q. Were you on there when the Coast Guard was making an inspection? A. Yes, sir.

Q. Did Captain Burke make the inspection? A. No, sir.

Q. Did he have anything to do with the inspection? Do you know Capitain Burke? A. I know him very well.

Q. And at that time they condemned the Hook because of its unseaworthiness, is that right? A. No, the Hook was never condemned, Mr. Dunham, at all.

Q. Well, he said they couldn't pull it out without expending money on it, is that right? A. That's exactly it.

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They said that you would have to make certain repairs and I knew that those repairs could not be made that season, that it would be a physical impossibility; and this became evident, as I say, somewhere between June 15th and June 24th.

Q. How many thousand did they say to spend on it? The repairs that would be required, how many thousand? A. The Coast Guard never gives you money figures.

Q. No, I mean they told you the repairs and you estimated the repairs would be thirty-five thousand, didn't you? A. It would probably hit—it wasn't so much the amount of repairs—

Mr. Wittner: If your Honor please—

A. (Continuing)—it was the time that would be involved.

The Court: It is answered, it is answered.

Mr. Wittner: All right.

Q. You said it is the time that would be involved. A. To effect these repairs.

Q. At that time she was in 77B, wasn't she, the Company? A. Yes. I don't know the technical name for it. It was in Chapter XI.

Q. Yes. A. The Chandler Act. I think that's not 77B.

Q. Well, she was under reorganization under the Bankruptcy Act.

The Court: What difference does it make?

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Mr. Dunham: Pardon me?

The Court: What difference does it make?

Mr. Dunham: Well, I had another question in mind.

The Court: Ask your question. Then we will see whether—

Q. And at that time she was in debt at least $90,000 for wages, wasn't she? A. No, sir.

Mr. Wittner: I object to that. It is immaterial.

The Court: She was not available, in any event. Whatever the cause was, she was not available.

The Witness: She was not available, your Honor.

Q. And at that time she had a mortgage against the ship by the Jockey Club, didn't she?

Mr. Wittner: I object to that as immaterial.

The Court: Yes, that has been testified to—fifty thousand and some dollars.

Q. And also by Mrs. Hill? A. Yes, there was a second mortgage.

Q. Do you remember the amount of her mortgage? A. Well, the first mortgage—

Wr. Wittner: That is objected to.

The Court: What difference does it make?

Mr. Dunham: Well, your Honor, I think it's highly important. He tells how much money this company made—

The Court: I don't care how much it made. He has given testimony as to what it cost to run it, and what they chartered it for, and I'll judge. It was in the custody of the Court.

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Mr. Dunham: Yes. Well, I had hoped that your Honor would take proof as to how many thousands of dollars she was in debt and take it in conjunction with it, when this man says they made so much money on this run the year before and can't afford—

The Court: I can run a boat and make a fortune on it and still mortgage it.

Mr. Dunham: But, there was so much, your Honor— there was thirty-eight thousand for dry-dock, sixty thousand for wages—wasn't it?

The Court: All right, suppose there were, suppose there were?

Mr. O'Brien: Here is the summary, right here (producing paper).

Mr. Wittner: The worst part about that is, if you go into anything like that we would have to show why— because she was caught in a bad storm, a hurricane, that's when she was damaged, and we would have to go into a lot of explanation for it, and it is immaterial—

The Witness: That was for capital improvements, those things, your Honor.

Testimony of Charles E. Gardner, Cross

Q. Don't you recall that she had bills against her for

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ninety thousand?

Mr. Wittner: That is objected to.

The Court: How old was the Sandy Hook? I remember her from my childhood and I am no baby.

The Witness: She was built in 1888, your Honor.

The Court: I was born in 1888.

Mr. Dunham: Well, I offer in evidence—

The Court: And I am in better shape than the Sandy Hook is now.

The Witness: Yes, sir.

Mr. Dunham: I offer in evidence this record of the bankruptcy court showing all the liens against this company.

Mr. Wittner: That is objected to.

The Court: No, unless you show the reason for it. I don't know. Maybe it was wrecked. I don't know what happened to it. There is no use going into that. I am not going to go into all that business.

Mr. Dunham: Well, if I may say, your Honor,—

The Court: Well, you are trying to say that this thing was not run at a profit.

Mr. Dunham: I thought it would help your Honor in deciding whether or not there would be any profit in running the Calvert with 1300 when they ran this big vessel and ran behind $90,000—

The Court: The Sandy Hook was run at a great

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profit for a great many years. Now I don't know what happened that caused it to be turned over to the Chapter XI proceedings.

The Witness: They made a profit in 1950.

Mr. Dunham: You see this witness and this libellant was the man that operated it under the Bankruptcy Act—

The Court: You say you made a profit in 1950?

The Witness: Yes, your Honor; we reduced our mortgages—

The Court: All right.

The Witness: —in fact, the track mortgage that they said was fifty, I had reduced that to thirty.

The Court: All right.

Q. Were you aboard when Mr. DeMars came aboard to make a survey? A. No, Mr. Dunham, I was not.

Q. Did you ever see a report of Mr. DeMars, who made a survey and put a value on the vessel of twenty-five thousand for junk?

Mr. Wittner: Which? the Sandy Hook?

Mr. Dunham: Yes.

Mr. Wittner: That's objected to. Do you want to prove what it was sold for in bankruptcy proceedings?

Mr. Dunham: No, that isn't it, that isn't it. It goes to his credibility.

Mr. Wittner: Oh,—

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The Court: Well, I am not going to hold him responsible for what happens in the bankruptcy court.

Mr. Dunham: May I say, your Honor, that this exhibit shows that considered as the assets of the vessel were these life preservers, and here is a witness that claims they belong to him.

The Court: All right; he says that he had a bill of sale for them. If he hasn't a bill of sale, then they belong to the trustee.

Mr. Wittner: Obviously.

Q. Now I think when I interrupted, you started to tell what you brought aboard from the Sunshine—the Calvert. A. I think I completed that, did I not?

Q. Is it true that you brought the aluminum gangplank from the Hook? Is that right? A. Yes, we put it on the Sunshine and from the Sunshine to the Calvert.

Q. And chairs. A. That's right. Some of the chairs came from the Sunshine.

Q. And some life preservers. A. Well, the life preservers all came from the Sandy Hook.

Q. And your men stenciled the life preservers, didn't they? A. Some of them; Mr. Fuchs stamped some of them.

Q. You mean to tell me he did the physical labor of stenciling these life preservers? A. He did. I seen him do it.

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Q. Now did you at any time conduct the Coast Guard drill or the Coast Guard operation looking to a certificate?

Mr. Wittner: I object to that. That was Fuchs' responsibility. He was to get him a Coast Guard certificate.

The Court: I think that's true.

Mr. Dunham: Well, there was a condition precedent.

The Court: Yes.

Mr. Dunham: And he must have the men to conduct the Coast Guard drill.

The Court: Yes. Who must?

Mr. Dunham: This man.

The Court: No.

Mr. Dunham: He said so.

The Court: No, No, he didn't.

Mr. Wittner: He didn't say that at all.

The Court: No, he didn't. He said that Mr. Fuchs requested him to furnish a crew so that he could have the conditions which were precedent and required for a Coast Guard certification.

Q. Did your men conduct the drill? A. No, Mr. Fuchs, I presume, and my captain, I suppose, and the Coast—the only one that could conduct the drill would be the Coast Guard inspector.

The Court: Do you know whether there was a drill conducted?

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The Witness: The Coast Guard inspector conducted it, I guess.

The Court: Was there a drill conducted?

The Witness: Not a boat drill, your Honor, no; that I know; there was no actual boat drill.

Mr. Dunham: There are two kinds of drills, your Honor; one where they just—

The Court: Was there any kind of drill?

The Witness: I do know they conducted a boat drill as to the tensile strength of the davits and there was a defective davit.

The Court: One of the davits was found faulty, is that right?

The Witness: But I do know from—my captain told me that they never had a boat drill as such; a boat drill in the water.

Q. Did he tell you that they overloaded the lifeboat and the davit bent? A. He didn't tell me that, and I don't believe that's true. I believe the davit was weak.

Q. Did he tell you that it was weak? A. Yes, he did. He told me it bent during the inspection. The only one that would load the boat would be the Coast Guard inspector anyway. He conducts the lifeboats. You know that, of course.

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Q. Well, the men do it under his instruction. A. That is right, yes.

Q. Did you hear that he was on the shore, on the pier, and that your men overloaded the boat? Did you hear that? A. No, I didn't hear that.

The Court: Well, how could he conduct the inspection if he was on the pier?

Mr. Dunham: Well, I understand that he was on the pier.

The Witness: I presume Mr. Fuchs was on the boat, so certainly he must have been there when it happened. I know he said he was on the boat at all times.

The Court: Were you there?

The Witness: No, your Honor, I wasn't there.

The Court: All right; then you don't know anything about it except what you were told and that's hearsay anyhow.

* * *

(Recessed until Tuesday, May 1, 1956)

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Newark, N. J., Tuesday, May 1, 1956.

(Trial resumed pursuant to adjournment)

The Court: You may proceed, sir.

Testimony of Charles E. Gardner, Cross

CHARLES E. GARDNER, resumed the stand.

* * *

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Cross-examination by Mr. O'Brien:

Q. Mr. Gardner, isn't it a fact that you were negotiating for the Calvert about a month before July 5th—July 2d? A. To the best of my recollection, it isn't a fact.

Q. It isn't. Well, do you remember when you signed your interrogatories, the answers to your interrogatories?

Mr. O'Brien: Will you get your interrogatories, Mr. Wittner?

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Q. (Continuing) And I refer you to the second answer to the interrogatories. You remember making answers to interrogatories, do you not, Mr. Gardner? A. Yes, sir.

Q. Around October 1952? Well, isn't it a fact that in answer to interrogatory No. 2 you said and swore to it, "Prior negotiations were had at different times about one month before July 5, 1951, at the Bethlehem shipyard," and by telephone and so forth? A. That's true in the sense that—

Q. Well, didn't you swear to that in your interrogatories? A. Yes, sir.

Q. In the answer to the interrogatory? A. Yes, sir, I did.

Q. Now I ask, my question to you is now that these negotiations were going on about a month before July 2d. A. The negotiations relative to the charter, yes, sir.

Q. I am taking your word for it, negotiations—

The Court: Relative to the charter.

The Witness: Relative to the charter.

Mr. O'Brien: Oh, yes; that's all we are talking about.

The Witness: No, I couldn't say that because early in June we had been looking—

Mr. O'Brien: I move to strike that out as not

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responsive to my question, your Honor.

* * *

Q. "If it is claimed that negotiations were had at different times and places before said charter agreement was finally concluded, please state specifically (a) the place or places where and (b) the time or times when such preliminary negotiations were had."

Now in answer to that interrogatory did you not give this answer and swear to it?

"2. Prior negotiations were had at different times about one month before July 5, 1951, at the Bethlehem shipyard and by telephone and so forth."

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A. That's right, sir. That's right.

Q. All right. Now, sir, you testified that it was July 2d, '51, that Mr. Fuchs and yourself really discussed the essence of this charter agreement. A. That is right.

Q. And at that time you said to Mr. Fuchs was the Calvert available, or words or substance to that effect. A. Yes; probably words to that effect.

Q. Yes. A. That's right.

Q. And Mr. Fuchs said, did he not, "Under certain terms and conditions"? A. That I don't recall.

Q. Well, didn't you testify to that? Haven't you ever said that? A. I mean the exact verbiage I—

The Court: No, no; just give us the sense of your discussion. We are not expecting you to remem-

ber the exact words. You may, I don't know, but if you don't, give us the sense of what you recall to have been said.

The Witness: Well, at that time Mr. Fuchs told me how much the charter price would be and that—

Q. I asked you didn't you say, please, that in answer to that question Mr. Fuchs said that the Calvert was available under certain terms and conditions? A. I suppose that

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was the sense of what he would have said I and believe that's—

Mr. O'Brien: I move to strike that out.

The Court: No, I will allow it to stand.

Q. Well, don't you remember when you testified, when you gave your deposition? You remeamebr giving your testimony before trial. A. Yes, sir, I do.

Q. All right. Now don't you remember—

The Court: What page, please?

Mr. O'Brien: Page 11, your Honor. At the bottom of page 10, your Honor, the question begins.

Q. "Question: Now, will you tell us what you claim to have been said on your first meeting with Mr. Fuchs at the Bethlehem yard, which you place, as I understand it, about July 2d, if I remember correctly?

"I told Mr. Fuchs at that time that the Sandy Hook during the hurricane the previous winter had sustained quite a bit of underwater damage, that we weren't aware at the time it occurred."

And continuing on down towards the center of the page:

"So I asked him" meaning Mr. Fuchs "if he would be willing to enter into a charter arrangement and he said he would under certain terms and conditions."

Don't you remember that, Mr. Gardner? A. Yes, in

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essence I do remember it, Mr. O'Brien.

Q. All right. All this was on July 2d; right? A. Yes, that's right.

Q. So on July 2d you agreed to $400 a day. A. Yes, sir.

Q. To charter the boat? Right? A. Yes, sir.

Q. And you agreed that it was to be a bare boat charter. A. No, not exactly.

Q. Well, do you deny that your agreement was a bare boat charter? A. I don't deny it.

Q. Well,— A. It might be termed a bare boat charter. I don't say that we used those words specifically. We may—

Q. Well, don't you know that it was a bare boat charter? There was no crew on this boat? A. Well, what we term a—

Q. No, I am asking you, what was your idea as to what the agreement was,—

The Court: Well, let's find out what he understands—

Q. —as to whether it was going to be a bare boat charter or not.

The Court: Let's find out what he understands by a bare boat charter.

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Mr. O'Brien: All right.

Q. What is your understanding of a bare boat charter? A. Well, as it pertains to our particular business, the excursion business,—

Q. What is a bare boat charter? A. —I am not going to discuss bare boat charters of ocean-going vessels because—

Q. Please answer the question.

The Court: What was your understanding of what a bare boat charter means?

The Witness: My understanding is that a vessel would be furnished with all appurtenances, furniture, fittings, [illegible] minus fuel, crew, insurance, wharfage.

Q. Do you think furniture would be included in a bare boat charter? It does in our business, yes, sir.

Q. All right. A. Yes, it does.

Q. Well, then you agreed with Mr. Fuchs and there was an understanding, was there not, that you were to supply the entire crew, on July 3d? A. Yes.

Q. Yes. A. That is right, sir.

Q. Yes.

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The Court: The entire crew? Or wasn't there an exception about an engineer?

Mr. O'Brien: But at this July meeting—

The Court: Now, wait a minute. Let me ask a question and get an answer.

Mr. O'Brien: I beg your pardon, your Honor.

The Witness: That was modified later.

The Court: That was modified later.

The Witness: Yes.

The Court: All right.

Q. But on July 3d I am talking about, Mr. Gardner. A. I said yes.

Q. That was the agreement, that you were to supply the entire crew, was it not? A. Yes, sir.

Q. All right. A. Yes, sir.

Q. Then on July 2d you told him that, using your language, that the race track people were interested parties. A. Yes, sir.

* * *

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Q. Now on July 2d you inspected the vessel, didn't you? A. Yes, sir, I did; partially, I partially inspected it.

Q. Well, you went all through it, went over the boat, didn't you? A. That's right.

* * *

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Q. All right. Now, Mr. Gardner, on that very day, namely, July 2d, 1951, wasn't there a discussion between Mr. Fuchs and yourself about a performance bond? A. No, sir, there definitely wasn't.

Q. Not a word said about a performance bond? A. Not a word was said.

Q. Well, didn't you agree with Mr. Fuchs on July 2d that whatever the terms and conditions of this charter arrangement were, that you would reduce it to writing? A. No, we did not.

Q. What? A. Not on July 2d.

Q. Do you remember on December 2, 1953, Mr. Gardner, you gave your testimony at the Southern District Court House in New York City? Mr. Wittner was there at the time. Don't you remember that? A. Yes, sir.

Q. Now, do you remember, sir, these questions asked of you on that day and at that place?

Mr. Wittner: What page, please?

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Mr. O'Brien: Page 48 of the deposition.

Q. "Question: Now, Mr. Gardner, didn't you expect this agreement with Fuchs to be reduced to writing?

"Answer: I told him it wold be well to do it, yes.

"Question: And you expected that.
"Answer: I certainly did.
"Question: There is no question in your mind about that.
"No, I assumed that we would reduce it to writing."
Do you remember that testimony? A. Yes, sir.

Q. Now, didn't that refer to July 2d? Didn't that conversation take place on July 2d? A. I think it referred to July 5th.

Q. I am asking you, isn't it your recollection that it referred to July 2d?

Mr. Wittner: If your Honor please,—

The Court: He says he believes it referred to July 5th.

Mr. Wittner: The testimony on page—

The Court: No, no, no, no. You will have a chance to come back. We don't want too much confusion here. Just make a note of what you want and then you will have a chance to ask it.

Mr. Wittner: Well, I thought I would call to counsel's attention, too, that the testimony specifically shows it was July 5th. Page 45.

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Q. Well, whether it was July 2d or July 5th, it was agreed between Mr. Fuchs and yourself that whatever arrangements, the terms and conditions of the charter party would be reduced to writing. A. Yes, sir.

Q. That's correct, isn't it? A. Yes, sir; I assumed so.

Mr. O'Brien: I move to strike out, "I assume so."

The Witness: I think that's what I said on December 2d, Mr. O'Brien.

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Q. No, I am asking you, wasn't that your understanding— A. Oh, yes, I understood that.

Q. —on July 2d? A. I understood that.

Q. That all the terms and conditions which you had been discussing with Mr. Fuchs relative to this charter party would be reduced to writing? A. Yes, sir, I did fully expect it.

Q. Well, on July 5th did you discuss with Mr. Fuchs the performance bond? A. The performance bond was discussed on July 5th.

Q. Do you say that July 5th was the first time that a performance bond was discussed? A. Yes, sir, I do say that.

Q. Well, now, what did you do about a performance bond? Did you inquire and try to get a performance bond? A. No, we discussed the performance bond but—

Q. Did you go to your insurance place—

Mr. Wittner: Just a minute. I object to that, if your Honor please, unless it appears that a bond was required. The witness has testified that that was modified.

The Court: Well, the question was simply whether or not— you see, what all you gentlemen fail to realize is that I am not an automaton; I am a Judge sitting here with a brain that is supposed to function, and if you will just remember that you will save a lot of my time and yours.

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Mr. O'Brien: That's what I am certainly trying to do, your Honor.

The Court: All right.

Q. Isn't it a fact, Mr. Gardner that you discussed the performance bond with your insurance agent, Mr. Dellenberger? A. Subsequent to the—

Q. No,—

The Court: At any time; at any time.

Q. At any time. A. Yes, we did discuss the performance bond.

Q. Didn't you do it on—

The Court: When?

The Witness: On July 5th.

A. Yes. A. Yes, sir, on July 5th.

Q. What time on July 5th, if you can answer, what time was it on July 5th that you saw Mr. Fuchs at the Bethlehem yard? A. About 1 p.m.

Q. And at that time, as I recall your testimony here on Friday, you had an appointment down at the Monmouth Park Jockey Club at 4 o'clock. A. That's right, sir; that's right, sir.

Q. And that you left the Staten Island yard, the Bethlehem yard, sometime between 2:30 and 3 o'clock. A. About

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3 o'clock.

Q. Now, didn't you discuss a performance bond with your insurance agent, Despard or Mr. Dellenberger, on the morning of July 5th? A. No, sir; I discussed it in the afternoon, July 5th.

Q. What time in the afternoon? A. Approximately—I can fix that time almost exactly; about 4:30 p.m.

Q. Where was this discussion, Mr. Gardner? A. I called Despard and Company, Mr. Carl Dellenberger, from the Monmouth Park Jockey Club office at Eatontown, New Jersey.

Q. Didn't you go to see him personally? A. No, sir, I did not.

Q. But on the 5th by telephone from the Monmouth Park Jockey Club you discussed with Mr. Dellenberger the question of a performance bond? A. It was in relationship—

Q. Did you do that? A. Yes, I did.

Q. Yes. A. I said that before.

Q. And did you tell Mr. Dellenberger that you wanted a performance bond? A. No, sir, I did not.

Q. Well, what was your discussion with Mr. Dellenberger about a performance bond? A. I asked Mr. Dellen-

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berger if his hull and machinery policy would cover the Diesel engine on a vessel.

Q. Please; I asked you what did you discuss about a performance bond with Mr. Dellenberger? A. I told Mr. Dellenberger that Mr. Fuchs asked for a performance bond, he thought he should have one on account of the new Diesel installation that was on the vessel, he was concerned with the Diesel being damaged.

Mr. O'Brien: No, I object to all this talk, your Honor.

The Court: You asked what the conversation was and he is telling you.

Q. What did you say about the performance bond? A. That's what I said. I am telling you what I said.

Q. Is that all you said about the performance bond? A. No, no, I asked him— I said Mr. Fuchs would like to have a performance bond to cover his new Diesel installation; will your hull and machinery policy cover his Diesel for damages. And he said yes, it would.

Q. You knew that, didn't you? A. I might have guessed it but I wanted to be certain of it because I was due to call Mr. Fuchs that night relative to this very item.

Q. By the way, Mr. Gardner, what is your idea as to what a performance bond is for?

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Mr. Wittner: I object— A. I can only tell you what Mr. Fuchs told me.

Q. No, what is your idea? You have been in this—

The Court: Well, I am frank to say—

Mr. Wittner: I would object to that, your Honor.

The Court: I am frank to say that I don't know. Is there something in the trade or whatever you call this marine operation, something which is recognized and accepted as a performance bond?

Mr. O'Brien: That's my understanding, sir.

The Court: With a special signification?

Mr. O'Brien: That's my understanding, sir.

The Court: Did you know that?

The Witness: Your Honor, I have never been required to post a performance bond.

The Court: Did you know, whether you were required or not, did you know the signifiance of a performance bond as it was accepted in the maritime business?

The Witness: No, your Honor, I did not.

The Court: All right.

Q. Did you ever hear of it in all your experience over ten years? A. Oh, I have heard the word performance bond used on many occasions.

Q. And you heard Mr. Fuchs talk about a performance bond in connection with the chartering of the Calvert, did

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you not? You say it was on the 5th. A. Yes, I heard Mr. Fuchs say it.

Q. Yes. A. That's right, sir.

Testimony of Charles E. Gardner, Cross

Q. And pursuant to the conversation or after Mr. Fuchs talked about a performance bond, you discussed the performance bond with Mr. Dellenberger, of your insurance agency. A. That's right, sir.

Q. Now did you ask Mr. Dellenberger at that time how much a performance bond would cost? A. No, sir.

The Court: Did you ask him what a performance bond was?

The Witness: I told him—I didn't understand exactly what a performance bond was—

The Court: Did you ask him, then, if you didn't understand it? Did you ask him what it was?

The Witness: No, your Honor, I did not.

Q. Did Mr. Dellenberger explain to you that you had to have some security or guarantor for a performance bond? A. No, sir, he did not.

Mr. Wittner: Who is this?

Mr. O'Brien: Mr. Dellenberger.

Q. Was that the only discussion you had with Mr. Dellenberger about a performance bond? A. No, sir; that

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was in the finish of the discussion.

Q. Well, tell us about the performance bond. What else was said by you or by Mr. Dellenberger on July 5th in this telephonic conversation that you told us about. A. Mr. Dellenberger asked me why the performance bond would be required in this instance, and I told him that they are asking for it to protect their Diesel installation, and then he said, "Well, your hull and machinery policy will protect that," and I said, "Well, he is concerned because we are going to put an engineer on there and he is concerned about

our engineer, probably malicious mischief to his engine." So at that point it was suggested to me by Mr. Dellenberger that he put his own engineer on, that Mr. Fuchs put his own engineer on.

Q. Oh, it was Mr. Dellenberger that suggested that, is that so? A. Well,—

Q. Was it Mr. Dellenberger? A. It was either Mr. Dellenberger or one of the men—

Q. Didn't you testify here on—

The Court: Wait a minute.

Mr. Wittner: If your Honor pleases,—

The Court: Wait a minute. Let him finish his answer.

A. I said it was suggested at that time that—

The Court: You said it was either Mr. Dellenberger or—?

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The Witness: Or one of the members of the track who were present while I was calling.

Q. Well, didn't you say here on Friday that it was one of the members of the track at this board of directors' meeting who had suggested this— A. It possibly could have been one of those, and I don't recall saying that on Friday.

Q. Was it Mr. Dellenberger that suggested it over the phone? A. It was either Mr. Dellenberger or one of the members of the track because we had a general—

Q. But you said on Friday—

The Court: That's your best recollection now?

The Witness: Yes, your Honor.

Q. But you said on Friday, did you not, that it was one of the members of the track that suggested it? A. I don't recall saying that.

Mr. Wittner: I object to that.

The Court: He says he doesn't recall saying it.

Q. You don't recall saying that Friday. A. Not definitely, no.

Q. All right.

The Court: My recollection of the testimony is that Fuchs suggested a performance bond because of the fact that he had a new Diesel engine and that that evening you told Fuchs that you would get a

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hull and machinery policy and suggested that Fuchs put his own engineer on the Diesel to be paid by you, then there would be no question of a performance bond.

The Witness: That's right, your Honor.

The Court: That's my recollection of the testimony.

Mr. O'Brien: That's his testimony, yes, as you just said.

The Court: Yes.

* * *

Q. Was there any other discussion on July 5th, Mr. Gardner, that is, with Mr. Fuchs down at the Bethlehem yard? A. Yes, sir, there was.

Q. Did Mr. Fuchs ask you for money on July 5th? A. To tender him money then?

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Q. Did he ask you for money? A. No, he didn't ask me for money; no.

Q. Did he ask you where was the copy of the written charter that he gave you and when were you going to sign it? Just yes or no. A. No.

Q. Was there any discussion about—

The Court: Was this on July 5th?

The Witness: Yes, your Honor.

Q. Was there any discussion at all on July 5th between Mr. Fuchs and yourself with regard to your signing this written charter? A. No, sir.

Q. Didn't you have that charter, that proposed charter, at that time? A. No, sir.

Q. When do you say was the first time that you saw it? A. Which charter are you referring to?

The Court: A written charter.

Q. A written charter, with the Sound Steamship Company on.

Mr. O'Brien: May I have that? It was marked for identification.

(Produced by the Clerk.)

Q. This—

Mr. Wittner: If you please, there is a question. Let him answer it.

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Mr. O'Brien: What was the question? May we have the question read?

Q. (Read by the Reporter.) A. The first time I seen that was on the Sunday following July 5th, which would be July 8th.

Q. July 8th. A. That's right.

Testimony of Charles E. Gardner, Cross

Q. Now I show you these papers which have been marked for identification Respondent's Exhibit 1, April 17, 1956, and ask you if this exhibit, that is these papers, do not resemble the written charter which you say you received and saw for the first time on July 8th?

Mr. Wittner: I object to that, if your Honor please. Any letterhead with the name Sound Steamship Lines would resemble it but that's no indication at all that this was the proposed charter.

The Court: Did you see a proposed charter on Sunday the 8th?

The Witness: I seen a charter form on Sunday the 8th, your Honor.

The Court: Is that the one you saw or can you identify it?

The Witness: This is not the charter I had seen that day, your Honor.

The Court: All right, that's all we are concerned with.

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Q. Didn't you read the so-called charter on July 8th? A. No, I only glanced at the so-called charter on July 8th.

The Court: Well, why if you only glanced at it are you sure this isn't the one?

The Witness: Because it had blank dates in it, your Honor, for the starting date of the vessel, and it had no amounts in there as to the money that was involved in the total amount of charter, and—

Q. Well, did you read that?

Mr. Wittner: Please let him finish.

The Court: Go ahead.

A. Yes, I have looked at this before. You showed me this or Mr. Dunham did at the deposition.

Q. You have had a copy of it for months, haven't you? A. Yes, that's right, I have looked at it, but I—

* * *

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Q. Do you say, Mr. Gardner, that on July 8th, 1951, you did not take those papers which Mr. Fuchs said to you were the written charter, namely, several typewritten pages on the stationery of the Sound Steamship Lines, and read it page for page? A. No, I didn't. I had a very good reason for it.

The Court: Well, I am going to ask him what his reason was. If you had it and didn't read it, why didn't you?

The Witness: Because I immediately seen that the charter would not apply to me, your Honor.

Q. Well, how far—

The Court: You said that before, too.

The Witness: I can point out the differences—

Mr. O'Brien: Wait, please.

The Court: No. Let counsel ask the question.

Mr. O'Brien: Wait a moment please.

Q. How far did you read of the written papers or charter before you discovered it didn't apply to you? A. I didn't have to read any further than the first page to discover that.

Q. Well, did you read the first page? A. I glanced at it. They had vacant spaces in it.

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Q. Did you read that first page, sir? A. Not word for word, no, sir.

Q. Well, what was in the—

The Court: Well, did you read enough of it to determine that it would not apply?

The Witness: Yes, your Honor.

The Court: All right. Now what of it did you read that made you know that it didn't apply?

The Witness: May I have the charter party or shall I tell you from memory?

The Court: Give me your best recollection.

The Witness: Well, I looked at the last page first, I probably shouldn't have done that but I did, and on the last page it had the place for signatures of the charter—

Mr. O'Brien: Excuse me, your Honor, but the question is about the first page.

The Court: No, no.

Mr. O'Brien: Now the witness is going to the last page.

The Court: No, the question I asked was, what was there that you saw in the charter—

Mr. O'Brien: All right, your Honor.

The Court: —which made you think it was not applicable?

The Witness: Well, on the last page it had provisions for the signatures—in one case the Sound Steamship Lines and in the other case it had a corporate, president of a corporation, that should sign, and I knew that dealing as an individual that I

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couldn't sign that particular charter party in that form. That was No. 1. And then on the other pages

it had blank spaces in it where the dates should have occurred and the amounts and I—

The Court: On the first page?

The Witness: Yes, partly on the first page, yes, your Honor; and I knew—at that time I said "Mr. Fuchs, it doesn't apply to me, this here part."

Q. How many pages did you glance at? A. Just a few pages; I didn't read—

Q. Well, how many pages did this so-called written charter contain? A. Or, to the best of my recollection there were five or six pages. It was similar to this here charter party.

Q. Well, take this, which is Respondent's Exhibit 1, and see whether the papers or so-called written charter that you say you first say on July 8th—

* * *

Mr. O'Brien: May the reporter read back the beginning of it?

The Court: Yes, please.

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Q. (Read by the Reporter as follows: "Well, take this, which is Respondent's Exhibit 1, and see whether the papers or so-called written charter that you say you first saw on July 8th") did not contain the same number of pages and the same form and practically—and the same language as the papers you examined on July 8, 1951.

The Court: All right. Now do you understand the question?

The Witness: Yes, your Honor.

The Court: You look it over and I will be back in a moment.

The Witness: Yes, sir.

(Short interruption)

The Court: All right. Now have you examined the document?

The Witness: Yes, sir, your Honor.

The Court: All right; proceed with your question now.

Q. Now after examining that—I will withdraw that.

The Court: The question was whether it contains about the same number of pages as the other one, and looks the same.

The Witness: Yes, your Honor, approximately. As nearly as I can recall, this looks to me as if it would have approximately the same number of pages.

The Court: How about the last page? Does it have the place for the corporate signature?

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The Witness: Yes, your Honor, this has.

The Court: And the first page?

The Witness: Is different in the respect that the blank spaces have been filled in.

The Court: And the one that you saw on that date, the 8th of July, had no spaces filled in on the first page.

The Witness: It had certain blank spaces on the first page, the one I seen, and also on the third page.

The Court: All right.

Q. Now, Mr. Gardner, you have had a copy of the Respondent's Exhibit 1 for identification since October of 1953, have you not? A. Well, I have had it for some time. I don't know—

Q. That was given to you at the time or given to your attorney at the time of your deposition before trial; isn't that so? A. I believe that's so.

Q. And you have had the opportunity of reading it, haven't you? and you did read it, didn't you? A. Well, I haven't read it even yet.

Q. Is this the first time you ever read through it? A. I didn't read it now, Mr. O'Brien.

Q. Is today the first time that you read through this Respondent's Exhibit 1 for identification? A. Frankly, I have never read it through word for word; never.

Q. Well, during the recess didn't you go through it? A. No, I didn't—couldn't have read it; I mean I—

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Q. Well, Weren't you reading it all the time that the Judge was absent from the bench? A. I was looking at the pages.

The Court: No, what he evidently did was glance over it to find the points of difference and the points of similarity that he noted the first time he saw it. Is that right?

The Witness: That's right, your Honor, that's substantially right.

Q. At the risk of repetition, in what respect does this Respondent's Exhibit 1 for identification differ from the copy of the charter, the written charter, which was handed to you by Mr. Fuchs on July 8, 1951, as you claim? A. Well, I could certainly not tell you all the respects; I can tell you the ones that I recall that it differs in—

Q. That's what I asked you, sir. A. Yes.

Q. Just in what respects does it differ? A. From the one that I seen I see that it differs on page 1, that there were certain blank spaces on page 1 of the one I had seen, where now the dates have been filled in and the name of the vessel has been filled in in this charter. On page No. 3, there was a blank space on page No. 3 that's been filled in.

The Court: What is that filled in with now?

The Witness: It's filled in with the four hun-

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dred dollar a day and certain other phraseology pertaining to the charter.

Q. Of course four hundred a day had been—A. That was agreed.

Q. That was agreed upon long before July 8th, wasn't it? A. That's right, Mr. O'Brien, but it was still vacant at that time.

Q. You claim that that was a blank space. A. That is right.

Q. The amount per day. A. Yes.

Q. All right. Now in what other respect? A. The official number of the boat I believe was not in there at that time; and then on the last page—well, that's the same as it was before; to the best of my recollection that's the same last page, type of last page, that I seen before.

Q. All right. All right. Now, just coming back for a moment to a previous question: Do you remember, Mr. Gardner, when you testified and gave your examination before trial on December 2, 1953, page 45, that you were asked this question:

"Question: How did that change come about?"

Meaning the change about the performance bond.

Beginning the answer, "That change came about this way:"

Continuing on down, the second to the last paragraph on page 45, didn't you say in answer to that question:

"And it wasn't me that made the suggestion but

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one of the officials of Monmouth said 'Why doesn't he put his owner engineer on?' So I said, 'Well, I don't know.'"

Didn't you make that answer—

A. Yes, sir.

Q. —to that question—A. Yes, sir.

Q. —at that time? A. Yes, sir.

Q. Well, was it Mr. Dellenberger that made the suggestion? A. I said it was either he or one—

Q. No, I asked you, did Mr. Dellenberger—

The Court: Wait a minute, wait a minute.

Mr. O'Brien: Excuse me, your Honor.

The Court: He said it was either Mr. Dellenberger or someone at the Monmouth race track.

Now in 1953, December 2, 1953, he said it was one of the officials of the Monmouth.

Q. Now which is it?

The Court: What is your best recollection now?

The Witness: I was talking on the phone to Mr. Dellenberger—

Q. No,—

The Court: What is your best recollection now?

The Witness: That somebody in the room had suggested it while I was talking to Mr. Dellenberger.

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Q. So the suggestion didn't come from Mr. Dellenberger?

Mr. Wittner: That's argumentative, your Honor.

Mr. O'Brien: Well, all right; I'll withdraw it. I will withdraw it.

Q. Now, was there any other discussion on July 5th, Mr. Gardner, with Mr. Fuchs? A. Yes, sir.

Q. What was that about? A. That was about the materials that were going to be delivered to his vessel for sale.

Q. And did you discuss price? A. Yes, sir, we did.

Q. And did you mention prices? A. Yes, sir, I did.

Q. Is it your understanding that on a bare boat charter the boat must furnish furniture and chairs? A. If—

Q. No, is that your understanding?, A. If it is a so-called bare boat charter it would furnish everything except crew and fuel, that's my understanding, and wharfage and insurance; everything else is furnished.

Q. Including chairs. A. Well, including anything else that would be normal for that particular vessel. Isn't that so?

* * *

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Q. Wait, wait. Did you claim that at the time, namely July 5th, that this aluminum gangplank and the 9-fathom

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rope belonged to you personally?

Mr. Wittner: Just one second, please.

If your Honor please, I want to make an objection in law. The authorities hold, as I am sure your Honor has read in my memorandum, that the respondents here have no right to question title and therefore there is no point in going into it; it has nothing to do with it.

Mr. O'Brien: Well, I submit, your Honor—

The Court: No, I think the situation is that he has said that at the time, he told these people he could get it from the Sandy Hook, which was at that time in the custody of the Court, as I recall it—

Mr. O'Brien: That's right.

The Court: —or the Trustee, and that he had been informed by the largest creditors that he might take such material as he needed from the Sandy Hook

for the equipment of the Calvert. That is my recollection of his testimony.

Mr. O'Brien: If it please your Honor, I don't think that is quite the point that I am raising. I think on his credibility I should be allowed to inquire as to whether—

The Court: Now do you think you are going to tell me just along this line of questioning what credibility I am going to give this man? I have heard his testimony.

Mr. O'Brien: Well, if I don't—

The Court: I have heard it, I recall what he said.

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Mr. O'Brien: But I mean you haven't heard what I am going to ask him.

The Court: Did you tell this man Fuchs at this time that you owned this material?

The Witness: I told him at that time that I was getting it from the Court and from the stockholders of Sandy Hook, that I had permission without qualification to sell it to him.

Mr. O'Brien: You see, that's why I would like to ask the question.

The Court: What question do you want to ask him?

Q. Did you tell Mr. Fuchs—the question you asked, your Honor—that you own this material?

Mr. O'Brien: That hasn't been answered.

The Court: Well, I think it has been answered when he said what he told Mr. Fuchs.

Did you say in so many words "I own this"?

The Witness: Yes, I said I got it—

The Court: Did you say "I own this. This is my property."

The Witness: I said "this is my equipment."

The Court: All right.

The Witness: Yes, sir.

The Court: All right. That was at the time—

The Witness: July 5th.

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The Court: July 5th.

The Witness: Yes, sir.

Q. And did that include the aluminum plank and the 9-fathom rope? A. At that time—

Q. Did it, please? A. Did I discuss that with Mr. Fuchs?

Q. Yes. Did that, your ownership of this equipment, did that—

The Court: No, it isn't a question of his ownership. It is what he told this man. Now what did you tell him you owned? What did you tell him you owned at that time?

The Witness: At that time?

Mr. O'Brien: He said all of it.

The Witness: We had discussed the life preservers, chairs, miscellaneous deck equipment, the fire axes, and soda and ash fire dispensers and—

The Court: Did you include the gangplank and the rope?

The Witness: Not in the sense that he was going to buy it at that discussion but in the sense that he would be able to look at it when we brought it over and make his own mind up.

Mr. O'Brien: I move to strike that out as not responsive.

The Court: Did you tell him that when you brought it over it would be your property?

The Witness: Yes, your Honor, I did.
The Court: All right.

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Q. All right. Now did you in a proceeding in the United States District Court on the 28th of March 1953 make an affidavit and swear to an affidavit as follows:

"It should also be pointed out that all of the property which is sought to be sold with the exception of two items, namely, the gangplank and the 9-fathom rope, is my personal property."

I show you this affidavit, Mr. Gardner.

Mr. Wittner: If your Honor please, I will object to any questions along this line on the ground that they have no right to question title and on the ground that—

The Court: No, I will hear it.

Q. That's what you said in the affidavit, didn't you? A. That's right.

Q. Yes. A. That's what I said.

Q. Well, was that the truth when you swore to it on the 28th—may I get the date, please?—When you swore to that affidavit in March 1953 in the proceeding in the bankruptcy court in the Southern District—A. Yes, that was true then.

Q. All right. A. That was true.

Q. Now at the time you started this libel proceeding in the District of New Jersey on the 10th day of July 1952,

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did you attach a schedule to the summons, to the complaint, in which you swore that you owned the aluminum gangplank and the 9-fathom rope? A. Yes, I did.

Q. So on July of '52 you swore you owned the aluminum gangplank and the 9-fathom rope and in October of 1953,

in a proceeding in the bankruptcy court, you swore that you didn't own the gangplank and the 9-fathom rope, is that correct?

Mr. Wittner: If your Honor please, I object to that. It only tends to confuse. The witness has made the point that he was told he could have it and that is was his by virtue of that direction, and other property. Now this certainly confuses the issue.

The Court: No, it doesn't confuse the issue for me.

Mr. Wittner: All right.

The Court: It might confuse it if a jury were here but I assure you it doesn't confuse it for me.

Mr. O'Brien: It shouldn't confuse anybody.

The Court: Well, lawyers have been known to try to confuse juries.

Mr. O'Brien: I see, your Honor. May I get back here a minute.

Q. Did you discuss the price of the aluminum gangplank and the 9-fathom rope on July 5th with Mr. Fuchs? A. On July 5th I told Mr. Fuchs that we had—

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Q. Did you discuss it, the price, I said—A. No.

Q. —of the gangplank and the 9-fathom rope on July 5th. A. No, no, no.

Q. Did you discuss the prices of the other materials that you claim that you put on board the Calvert? A. Not specifically all the material, Mr. O'Brien, but—

Q. I see. But you said in your testimony, as I remember it, that it was agreed as to the prices on July 5th. A. That's right.

Q. That's correct. Now up to that time Mr. Fuchs never saw the life preservers, did he? A. That's right, he did not.

Q. He never saw the gangplank. A. That's right.

Q. Or the 9-fathom rope. A. That's right.

Q. He never saw any of the furniture. A. That's right.

Q. Nor any of this sundry material that you claim that you put on the Calvert. A. No, he didn't see any of it, Mr. O'Brien.

Q. As a matter of fact, you testified that all this material was delivered by the Sunshine and put on the Calvert

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on Sunday July 8th, isn't that it? A. That's right.

Q. All right.

The Court: He further testified that it was counted and inspected by Fuchs.

Mr. O'Brien: Well, I am going to come to that in a moment, your Honor.

The Court: I am at it now.

Mr. O'Brien: Well, I will just continue—

The Court: All right, I am at it now. You may come to it again.

Mr. O'Brien: I mean—

The Court: I wish you please wouldn't try to suggest how I am going to conduct this. You conduct your case as you please but I am going to find out the information that I want at the time I want it. Now don't let's discuss it any further. Please proceed now.

Mr. O'Brien: Well, I don't intend to—

The Court: Please proceed now.

Mr. O'Brien: I am sorry.

Q. On July 8th, on Sunday, July 8th, as his Honor has just said, the material that was taken from the Sunshine was put on the Calvert and counted; right? A. Yes, sir, it was counted.

Q. And was the Coast Guard inspector there then? A. No, sir.

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Q. And that was counted in the presence of Mr. Fuchs, yourself and the members of the crew. A. Mr. Fuchs counted it.

Q. Well, did he count— A. It was put up in piles and it was counted.

Q. All right. And didn't you say the other day that you made a memorandum?

The Court: Was Fuchs' brother-in-law there, too?

The Witness: There was a man there that Mr. Fuchs introduced to me as, I think, his brother-in-law.

Q. All right. Now you said you made a memorandum, isn't that correct? A. Yes, sir, that's right.

Q. You made a memorandum of the number of life preservers. A. Yes, sir.

Q. The number of chairs. A. Yes, sir.

Q. Is that right? A. That's right.

Q. You made a memorandum of the gangplank, the 9-fathom rope? A. Well, not every item specifically. Most of them I made a— there was general deck equipment and I just simply listed that.

Q. All right; have it any category that you wish. A. Yes, sir.

Q. General deck equipment. A. That's right, sir.

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Q. And did that include mops and brooms and so forth? A. Yes, sir.

Q. And then did you also itemize paints that you claim you put aboard? A. Yes,—

Q. So many gallons? A.—there was paint put aboard.

Q. Now was that memorandum in your handwriting? A. Yes, sir.

Q. Where is that memorandum? A. Mr. Fuchs has it.

Q. Well, didn't you say that you gave the memorandum to Mr. Fuchs and that Mr. Fuchs gave you back the memorandum? A. No, I did not say that.

Q. You didn't say that. A. I said I gave it to him and he checked the items.

Q. All right. Did you ask Mr. Fuchs to sign the memorandum? A. No, sir, I did not.

Q. Did Mr. Fuchs ever sign a memorandum with respect to the material and the equipment that you say was put on the Calvert on Sunday July 8th? A. To the best of my knowledge, he did not.

Q. You never asked him to, did you? A. Oh, yes, I did.

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Q. Well, when did you ask him to? A. At the time that Mr. Fuchs withdrew the boat.

Q. What time? A. On July 11th or July 10th.

Q. Now didn't you—

The Court: Excuse me just a minute. Did you keep a memorandum yourself of the material you put on there?

The Witness: Yes, your Honor, I had it written down but the memorandum that I used for Mr. Fuchs was a memorandum I made of the materials as such and then I had to make my own memorandum later.

Q. Where is your memorandum? A. I believe it is in Mr. Wittner's file somewhere.

Q. Well, will you produce it later, after the recess? A. I will look for it, yes.

Q. Have you got the original memorandum or a copy? A. Mr. Fuchs got the original. It was a list; it wasn't—

Q. And when did you make that memorandum up? A. I made that out on July 8th.

Q. Did you make it out while you were on the Calvert, while they were counting out this material from the Sunshine? A. No, no, I didn't make it then. I had it made before the Sunshine arrived at the Calvert.

Q. Who made the memorandum? you personally? A. I made it personally.

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Q. Was it in your own handwriting or was it typewritten? A. It was in my own handwriting, yes, sir.

Q. I see. And did you make two copies or was there s— A. I made one copy, a list of the materials—

Q. One copy. A. Yes, sir.

Q. And then you say you gave that one copy to Mr. Fuchs. A. I gave it to him for the purposes of checking the material.

Q. And you had a copy for yourself. A. I only—I made a copy later from memory, I said.

The Court: No, he made a copy later, after the boat was gone.

The Witness: It was the only copy I had.

Q. When did you make the copy later, sir? That's what I am trying to find out. A. Well, after July 11th, when the boat was withdrawn.

Q. But you said Mr. Fuchs had the original memorandum. A. He had the original memorandum.

Q. Do I understand you to say that while Mr. Fuchs had the memorandum that you made a copy of it? A. No.

The Court: No, no, no.

Mr. O'Brien: I am sorry.

The Court: If you will just listen to what he says. He said that he made the memorandum on his

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brother's boat as they were coming up to the Calvert, that he gave that memorandum to Mr. Fuchs to check, that Fuchs kept that memorandum and that he had no copy, that he made his own copy after the 11th of July, when the boat was withdrawn.

Now that's your testimony as I heard it twice.

The Witness: That's right; yes, your Honor.

Q. So you didn't make that copy from the original memorandum that you gave Fuchs. A. No, I did not.

Q. Coming back to the 5th of July, Mr. Gardner, was there any discussion at all between Fuchs and yourself as to how this material, that is, the equipment that you claim, was to be treated with regard to whether it was a lien on the credit of the ship or whether Mr. Fuchs was going to pay for it? A. The discussion relative to that was that he would either pay cash for it or else it could be applied later on in the charter period as against the charter hire. Either way he wanted to work it would have been all right.

Q. Well, now, in your libel here, your first cause of action, don't you claim that at the special instance and request of respondent you hired supplies and equipment for the boat, such as life preservers, fire extinguishers, chairs, and other miscellaneous items "shown on the schedule attached hereto" and that you did that and rendered that upon the credit of the vessel? A. That's true.

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Q. Isn't that so? A. That's right.

Q. Well, now, that was when you started the libel in July of '52. A. That's right. You are right.

Q. And then you swore to that and upon your sworn statement you got an attachment and you libeled the vessel. A. Yes, sir. It was also delivered on the credit of the vessel.

Q. Wait a minute now, please. At the time that you discussed this alternate, as you claim, this alternate idea as to the credit of the vessel or as to part of the down payment with Fuchs, did you at any time ever make out any bill or send Fuchs a bill for this equipment? A. I gave him the bill originally on July 8th.

Q. You mean the memorandum? A. Yes, with the prices; the prices were on there.

Q. Would you say that was the bill? A. Yes, that was the bill. I mean you could make anything else you wanted on it but that was it.

Q. All right. Now since that time did you ever tender him any other bill or invoice? A. Well,—

Q. Since July 8th did you ever send him any other bill? A. You mean a written invoice as such?

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Q. Yes. In writing. A. Unless my attorney did it.

Q. No, I am asking you. A. I never did, no; no, I did not.

Q. Did you personally ever make any demand on Fuchs or the Sound Steamship Company from July 8, 1951, until the time you filed this libel in July of 1952? A. Yes, I did.

Q. A written bill? A. No, a verbal demand.

Q. A verbal demand. A. Yes, sir.

Q. And when was that made, Mr. Gardner? A. On July 11th or July 10th or the 11th; either one of those days.

Q. That's the time that this blow-up occurred and you had this argument. A. That's right, sir.

Testimony of Charles E. Gardner, Cross

Q. And you demanded from Mr. Fuchs at that time money? A. Payment for the items that were delivered to his vessel.

Q. And did you tell him how much it was? A. Yes, I told him.

Q. And did Fuchs say to you "Get your material off the boat, with your crew"? A. No, he didn't.

Q. He never said that. A. He said part of that but not all.

Q. All right.

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The Court: What did he say?

The Witness: He said "Get your crew off the boat."

Q. Now on July 2d or July 5th did you ask Mr. Fuchs for the enrollment papers of the Calvert? A. No, I did not ask him.

Q. Did you ever see them? A. I don't recall ever seeing the enrollment papers.

Q. Do you know whether—

The Court: What are enrollment papers?

The Witness: A consolidated certificate of enrollment which pertains to the vessel and its ownership.

Q. Well, didn't you know that these enrollment papers were with the Coast Guard? A. No, I didn't know that.

Q. Well, didn't you know that the enrollment papers would not be obtained until after the certificate had been—

Mr. Wittner: If your Honor please—

Mr. O'Brien: Let me finish.

Mr. Wittner: I object to that. The witness said he didn't see it. What difference does it make who held it?

The Court: Let's find out. Go ahead.

A. I assumed that the—

Q. I haven't finished my question, sir. A. All right. Sorry.

Mr. O'Brien: I will withdraw that part of it, your Honor, and start all over again.

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The Court: All right, start the question.

Q. Didn't you know that the enrollment papers would be delivered to the owner of the Calvert only after the Coast Guard inspection and the passing of the vessel? A. I would have no way of knowing that.

Q. All right. Now didn't you say somewhere, didn't you say that?

Mr. O'Brien: I will go on with something else, your Honor, and my associate will try to find that.

The Court: All right.

Q. It is a fact that the Coast Guard certificate could only be obtained after the crew that you put on the Calvert went through the boat drill and fire drill, isn't that so? A. Not necessary my crew; any crew.

Q. But your agreement was that you were to supply the crew. A. After the Coast Guard certificate, yes.

Q. No, your agreement was on this charter that it would be your crew, except for the modification that you say that Mr. Fuchs would put on his own chief engineer.

Mr. Wittner: I must object to that, your Honor. It is entirely misleading. He was to furnish the

crew when the boat was certificated and the certificate issued.

The Court: Well, as I understand it, you were supposed to furnish the crew in order that there might be an examination by the Coast Guard.

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The Witness: Well, if your Honor will permit me,—

The Court: Yes, yes.

The Witness: —I can give you the reason why I did.

The Court: No, I mean was that the understanding?

The Witness: Mr. Fuchs requested me to use my crew, yes, to enable him to go through inspection.

The Court: To put a crew on there so that there could be proper inspection by the Coast Guard.

The Witness: Yes, it was to expedite that inspection.

The Court: That was for the boat drill and all that.

The Witness: Yes, your Honor.

Q. Why, on July 2d you agreed to put the entire crew on, didn't you? You said that here this morning. A. I would have done it at any time.

Q. Yes. A. Furnish a crew to help.

Q. You knew that—

Mr. Wittner: If your Honor please counsel is confusing, probably confused himself.

Mr. O'Brien: I object to this business, counsel saying whether I am confusing it. I think if there is an objection counsel should make it.

The Court: No, I don't think counsel is confused, I think he has a perfectly clear idea in mind but whether he is getting it across to this witness or not

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is another matter. Let him try to get it across to the witness; let him ask the question and then you object to it.

Mr. Wittner: There is a distinction—

The Court: Let him ask the question and then you object to it, if you feel that it is objectionable.

Now ask your question.

Mr. O'Brien: Yes, your Honor; I will try and see if I can't get it across clearly.

Q. There isn't any question that when you took this boat or intended to take this boat under a charter that you were supposed to supply the crew, is there? A. No question at all.

Q. All right. Now to have a Coast Guard inspection and to get a certificate, or a certification, as you call it, you had to have a crew present.

Mr. Wittner: No,—

The Court: No, he didn't have to have a crew present because the owner could have had a crew.

Mr. O'Brien: But in this case it was a crew—

The Court: Let's get that clear because there is the confusion.

Mr. O'Brien: All right; may I start all over again, your Honor?

The Court: No, you won't start all over again; oh, Good Heavens, no!

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Mr. O'Brien: I don't mean entirely; I just mean—

The Court: No, just take it up from the essential points.

Mr. O'Brien: That's right.

Testimony of Charles E. Gardner, Cross

The Court: When was the first time you agreed with Fuchs that you would put your crew on there in order to have Coast Guard inspection?

Is that what you mean?

Mr. O'Brien: That's it, your Honor.

The Court: All right, go ahead.

A. On July 8th—on July 5th Mr. Fuchs asked me if I could bring—

Q. When was the date—

The Court: Let him finish the answer.

Go ahead now. On July 5th Mr. Fuchs asked you what?

The Witness: If when I was delivering the materials I could bring a crew with me, because on July 9th, Monday morning, he expected the Coast Guard inspector, and if I could help him with my crew rather than him bringing a crew out from New England or New Bedford or somewhere for two days, it would be impractical, and I said yes, I would bring my own crew over on July 8th.

Q. Why, wasn't that the original agreement, that you were to put the crew on and that it was your crew and your captain?

Mr. Wittner: Now,—

The Court: Just a minute, now. There was an

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original agreement on this bare boat charter that the crew was to be furnished by Gardner.

Mr. O'Brien: That's right.

The Court: Now this is a different thing. He says now that there was a discussion that before he took over he was to put his crew, the crew he was going to use, on board in order that Fuchs might

have the Coast Guard examination. Now that's an entirely different situation. He may have kept the same crew on or may have intended to keep the same crew on.

Mr. O'Brien: May I put this question that I—

The Court: You may put any question you like and I will pass on whether I deem it appropriate or not.

Mr. O'Brien: May I have the question that I put there first and which I didn't finish, please?

The Reporter: The last one?

Mr. O'Brien: Yes, please.

The Court: Well, you finished it as far as I allowed you. Is that the one you mean?

Mr. O'Brien: Yes, your Honor.

The Court: The one that I—

Mr. O'Brien: That's the one I mean.

The Court: All right, you ask it anew. Never mind that; ask it anew.

Mr. O'Brien: All right.

Q. Isn't it a fact and that it was your understanding

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that the crew that you brought there on the 8th of July, namely Sunday, was your crew and that was the crew that was, under your master, going to conduct the fire drill and the boat drill to get the certificate from the Coast Guard? A. Yes, that would have been, that would have been the crew.

The Court: That was the understanding.

Q. That was the understanding. Now, then,—

The Court: Now, then, let me find out—

Mr. O'Brien: All right

The Court: You see, you gentlemen are entirely familiar with these maritime situations; I apprehend them as I go along.

Upon whom was the obligation for having the Coast Guard examination made?

The Witness: Shall I answer, your Honor?

The Court: Yes.

The Witness: Well, I was to take—the charter was to become effective when the Coast Guard—

The Court: On—

The Witness: On the owner.

The Court: Before a charter was entered into was it necessary to have a clearance by the Coast Guard?

The Witness: Yes, your Honor.

The Court: Upon whom did the duty of having that clearance or certification by the Coast Guard made fall?

The Wintess: On the owner of the vessel.

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The Court: All right. You were not the owner of the vessel.

The Witness: No, your Honor.

Q. That's your claim, that it as on the owner of the vessel, and that was the understanding between Fuchs and yourself. A. To get the Coast Guard certificate, yes, sir.

Q. Wasn't it agreed by you, sir, that as soon as the crew which you furnished was brought over to the vessel, which was on July 8th, on a Sunday, that the following day, Monday, a Coast Guard inspection would be had under the direction of your Captain Jenks? Is that his name?

Mr. Wittner: If your Honor please, I will object to that. The witness has stated Friday and today

several times that Fuchs told him he expected the inspector to make an inspection on Monday. That does not make it an agreement.

The Court: All right. Now there was an agreement between Fuchs and this man, according to his own testimony, that the day before the examination by the Coast Guard he would bring on his own crew, and that they would be there to conduct such operations as were necessary for the examination by the Coast Guard.

Mr. Wittner: That's right.

The Court: I don't think there is any misunderstanding about that.

Q. Now the master of your vessel was Captain Jenks,

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wasn't it? A. Yes, sir, he was.

Q. Is it the master of the vessel that conducts these drills, is it not? A. Not when—

Q. In the presence of the inspector? A. Not when the owner is present.

Q. Doesn't the— A. You ask me and I say no.

Q. You say no. A. Not under these conditions.

Q. Well, who conducts the drills, the fire drill and the boat drill? A. The Coast Guard inspector.

Q. Under his direction? A. Yes, always, on a Coast Guard inspection.

Q. What does the master of the vessel do while— A. Assists in the drills.

Q. Doesn't he give the command? Doesn't he direct it. A. Not the Coast Guard inspection.

Q. All right. A. No.

Q. All right. Now, wasn't it after you delivered the crew on July 8th that you said to Mr. Fuchs, "The crew is

here. We will put them on and go through the inspection. We are ready to go."

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Mr. Wittner: What page are you reading from?

Mr. O'Brien: I am reading from page 110 of the deposition, in answer to the question in the middle of that page "Let me ask you what constitutes delivery?"

Q. Did you say that to Mr. Fuchs? A. Would you repeat it again now, Mr. O'Brien?

Q. I am asking you, Mr. Gardner, I will withdraw the previous question, I am asking you, Mr. Gardner, whether it is not a fact that on July 8th, after the crew came aboard the Calvert and after you delivered what you call your equipment, that you said to Mr. Fuchs "The crew is here now. We will put them on and go through with the inspection. We are ready to go."

Mr. Wittner: If your Honor please, that is only a portion of his statement and I submit it is an unfair quotation. I think the entire answer if read would give a somewhat different impression.

Mr. O'Brien: If I may be permitted—

The Court: Well, do you mean the rest of it, "Do you want the crew to stay on board,"—

Mr. Wittner: That's right. That's what I mean.

The Court: —"do you want them to go ahead and perform their duties?"

Mr. Wittner: That's right.

Mr. O'Brien: I'll add that, I'll add that.

The Court: The balance of the comment.

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Mr. O'Brien: Yes. All right.

Q. Do you want me to read that, too? A. I heard it, Mr. O'Brien. That is true; I said that.

Q. And of course the duties of the crew were to go through the drills so you could get your certificate from the Coast Guard, isn't that so?

Mr. Wittner: Your Honor,—

The Court: We must assume that if there is a drill the crew will go through with it. Now again I must ask you, please, to give me credit for primary assumptions, if nothing more.

Mr. O'Brien: Well,—

The Court: I resent the imputation of these questions.

Mr. O'Brien: Well, I don't know—

The Court: I know, I know that you can't have a drill without men.

Mr. O'Brien: Well, that wasn't the import of the question.

The Court: The question was, wasn't the crew to do it? We have been over that.

Mr. O'Brien: Well, I submit, sir,—

The Court: The only people who were to go through the drill were the crew.

Mr. O'Brien: May we have the question re-read? I was talking about, saying, that the duty of the

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crew was to do that and he is talking about the duty. Suppose I withdraw it and put it this way:

Q. Didn't you tell Fuchs in addition to that, that very day, "Do you want the crew to go ahead and perform their duty?" and I ask you whether or not part of the duty of that crew that you put aboard wasn't for the inspection to get the certificate?

Mr. Wittner: I object to that.

The Court: Let him answer it.

Mr. Wittner: It is argumentative.

The Court: Let him answer it.

A. The duty of that crew was to take any instructions from Mr. Fuchs that he cared to give them and to follow them.

Mr. O'Brien: I move to strike it out.

The Court: No.

Mr. O'Brien: It is not responsive at all.

The Court: No, you asked him what their duty was and he tells you what he thinks their duty was.

Q. Mr. Fuchs didn't hire the crew, did he? A. No, he asked me to put them on board.

Q. Did Mr. Fuchs hire the crew? A. No, he did not.

Q. He didn't have any control over your captain, your master. A. Yes, he did. He is the owner of the vessel and the vessel is in port, and he certainly has control over my master.

Q. After you put your crew aboard. A. My crew is

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aboard there to protect the vessel in a maritime sense. The owner is on the vessel to protect it at all cost; he is the boss.

Mr. O'Brien: I move to strike that out—

The Court: No.

Mr. O'Brien: —as not responsive to my question at all.

The Court: No, no, I will let it stay.

Mr. O'Brien: Well,—

The Court: Let me remind you that the full answer to the question that you repeated before runs this way:

"On July 8th, on Sunday, I brought the crew over at the suggestion of Mr. Fuchs. The inspection was going to be completed and the boat was getting ready to get under way and he said that he was going to bring his engineer down on Sunday or Monday July 9th, and when I delivered the equipment to him I said 'The crew is here now. We will put them on and go through the inspection. We are ready to go. Do you want the crew to stay on board. Do you want them to go ahead and perform their duties?' and he said 'Yes.'"

Mr. O'Brien: That's correct.

The Court: Well, at least I can read. I am glad you concede that.

Mr. O'Brien: I don't mean that. I mean that that's my understanding of it and that is the way I read it.

Q. And didn't you claim in this libel and don't you claim now that Mr. Fuchs or the Sound Steamship Com-

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pany breached this agreement by Ernest Fuchs removing the ship's papers before the delivery of the certificate of inspection? A. Yes, I do.

Q. And that's what you said in answer to the interrogatory. A. That's what Mr. Fuchs told me, he removed the papers.

Q. Did you ever see the papers?

Mr. Wittner: That has been covered before.

A. I don't recall.

Q. All right. A. Which papers are you referring to?

Q. I am referring to the ship's papers, the enrollment

papers and everything that goes with the ship. A. I did see part of the papers; I seen—

Q. Which part did you see? A. I seen an old certificate of inspection, a Coast Guard certificate, I seen that,—

Q. When? A. —but I did not see the consolidated enrollment, if that's what you are referring to. When I went aboard the Calvert; there was an old certificate under glass at the time I was aboard.

Q. And you say that those ship's papers were removed —you say that Mr. Fuchs told you the ship's papers were removed? Is that what you mean? A. He told me he was removing them.

Q. He was removing them.

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The Court: When? When did he tell you that?

The Witness: On July 10th or 11th.

The Court: Well, again I plead unfamiliarity with the practice. Where are these ship's papers usually kept?

The Witness: When the owner is aboard he would probably keep them in his pocket, your Honor, and then when the owner leaves the ship and the ship goes to sea they are kept in the Captain's safe.

Q. You knew the ship was laid up several years before that, didn't you? A. Yes, I knew that, Mr. O'Brien; yes, sir, I did.

Q. Yes.

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* * *

Q. And you knew, Mr. Gardner, of course, that the Coast Guard makes an annual inspection of ships. A. Only when it is requested.

Q. Well, when a ship is laid up they don't make inspections. A. That's right.

Q. But when a ship is in use they make inspections, do they not? A. If it is in use they do, yes.

Q. In use. A. You must request the inspection—

Q. Yes, that's what I mean.

The Court: Now wait a minute. Do they make an annual inspection regardless of whether you ask to have it inspected or not?

The Witness: Your annual inspection must be requested in writing by the owner of the ship to the Coast Guard commander.

The Court: That's for a ship that's in use all the time.

The Witness: Yes.

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Q. When the ship is in use. A. Yes, sir.

Q. And didn't Mr. Fuchs advise you, sir, that there were no papers on the ship, no enrollment papers, until after this Coast Guard inspection, when he would be able to obtain the ship's papers? A. No, he didn't advise me of that.

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The Court: Well, are these enrollment papers a permanent document, which are stamped by the Coast Guard, or are they something that is given by the Coast Guard.

Mr. O'Brien: No, they are given by the Custom House, your Honor.

The Court: Given by the Customs House and kept permanently for the vessel?

Mr. O'Brien: That's right.

The Court: And then at the time of the inspection they are turned over to the Coast Guard?

Mr. O'Brien: At the time of the inspection, as I understand it, your Honor, then the new enrollment papers are issued.

The Court: New enrollment papers?

Mr. O'Brien: New enrollment papers; especially when a ship has been laid up. I might say this, and I don't think I am going out because we will establish it, this vessel was—

The Court: No, I don't care about it particularly, I want to get the general practice. You say enrollment papers are given by the Customs.

Mr. O'Brien: Yes, your Honor.

The Court: What do they consist of?

Mr. O'Brien: Well, they consist of the description of the vessel, the number of the crew, what the vessel is licensed for, whether it is the inland waters

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or whether it is coastwise or what-not, but the new enrollment papers are not delivered until the Coast Guard passes the vessel.

The Court: Every time the Coast Guard examines and passes a ship it receives new enrollment papers.

Mr. O'Brien: That's right.

The Court: Sort of a license, is it?

Mr. O'Brien: That's right. That's my understanding.

Q. As a matter of fact,—

Mr. Wittner: May I suggest we ask the witness what he understands an enrollment certificate is?

Mr. O'Brien: All right. I will pose that question and put it in my language:

Q. What is your understanding, sir, of an enrollment certificate? A. They do not issue new enrollment papers at each Coast Guard examination. They do not do that.

Q. Well, I mean the point is not that— A. They issue a new Coast Guard certificate at each inspection but your enrollment papers stay the same unless you change the character of your vessel; in that case, it may be. You may have your enrollment papers for twenty years.

The Court: The same one?

Q. But in this particular instance—

The Court: The same one?

The Witness: The same one for twenty consecu-
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tive inspections.

Q. But in this instance, Mr. Gardner, you know that this ship was laid up—

The Court: But, you see, what I asked was the general practice. I said specifically I don't care to know about this instance. I want to know what the general practice is about enrollment papers and of what they consist. You tell me that they consist of a description of the vessel, the number of the crew, the purpose for which it is authorized, whether for inland waters or coastwise line or transoceanic. * * *

The Court: No, no, I am not asking his idea. I want to find out what the general situation is in the maritime business. I mean we are going to get nowhere if you are asking something and none of us know what we are talking about.

Mr. O'Brian: Well, may I ask this one question to set the premise for it?

Q. Your idea of that—

The Court: I don't care what his idea is. Before we get his idea or anybody else's idea here I want

to find out whether there is such a thing as a recognized document known as enrollment papers in the maritime service or business, and if so, what it is,
(210)
and for how long it is effective, and under what conditions it is effective. That's what I want to find out. I have got to find out or I don't know what you are talking about.

Mr. Dunham: Well, Mr. Fuchs knows. Could he answer?

The Court: If he knows, yes, I would be only too happy to have any—

Mr. Dunham: He knows all about it.

Mr. Fuchs: A Custom House certificate of enrollment is issued every time a vessel changes ownership. Now if a vessel is operating, you use the same enrollment paper and the captain has to go up each year after annual inspection and sign on as master of the vessel.

The Court: But the owner keeps the same enrollment papers until there is a change of ownership.

Mr. Fuchs: Until it changes ownership. Now in this particular—

The Court: So if one man owns the vessel for twenty years, that—

Mr. Fuchs: It can go on forever.

The Court: It can go on forever.

Mr. Fuchs: But in this case the Government—

The Court: I don't care about this case.

Mr. Fuchs: All right.

The Court: Please get into your mind I am trying to find out just what an enrollment paper is.
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Mr. Fuchs: That's what it is. It is a certificate, really, of ownership.

The Court: It describes the vessel—

Mr. Fuchs: It describes the vessel—

The Court: —the number of the crew—

Mr. Fuchs: The number of the crew, the tonnage of the vessel, the net tonnage of the vessel, it shows whether it is a passenger— it has an official number on it, the vessel's official number on it, and—

The Court: And the purpose for which it is used.

Mr. Fuchs: To prove ownership; so that when you inspect the vessel the United States Coast Guard—

The Court: Now, then, when the Coast Guard inspects the vessel that certificate of enrollment is produced.

Mr. Fuchs: Either that or an abstract.

The Court: An abstract.

Mr. Fuchs: An abstract from the Custom House. You take your certificate to the Custom House and they give you an abstract because the United States Coast Guard inspector has to mark that in his book, that he has seen an abstract or the enrollment papers.

The Court: All right.

Mr. O'Brien: Now just this one, if I may?

Q. Did you know that since Mr. Fuchs or the Sound Steamship Company bought this vessel, the Calvert, from the United States Government, it wasn't in operation? A.

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I didn't know—

Q. All right. A. —from whence he bought it or when.

Q. All right. A. I didn't know that, Mr. O'Brien.

* * *

Q. I show you a photo copy, Mr. Gardner, of an affidavit signed and sworn to by you on the 5th day of August, 1952,

in connection with the proceeding under the Bankruptcy Act, you see, in the District Court of the United States for the Southern District, and ask you whether or not you didn't say in that affidavit—may I just look at it?—"Claimant subsequently"—"Claimant" meaning Mr. Fuchs—"subsequently removed the ship's papers as the result of which I could not operate the boat and was compelled to yield possession."

You put that in your affidavit. A. That is right.

Q. All right, thank you. Now, Mr. Gardner, do you remember whether you called the Bethlehem yard on the following day, namely, July 6, 1951? A. July 6th would be

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on a Friday.

Q. That's right. A. Yes.

Q. July 6th would be Friday. A. Would be on a Friday. I don't recall specifically calling there. I may have. I don't recall that.

Q. Well, do you remember whether you were there at the Bethlehem shipyard on Saturday? That would be July 7th, the day before the equipment, material and so forth were delivered from the Sunshine, as you claim? A. July, that would be July 7th.

Q. That would be a Saturday. A. I may have been there, Mr. O'Brien. If I was I don't think I talked to Mr. Fuchs.

Q. All right. Well, now coming to Sunday, July 8th, when the Sunshine came over with these life preservers and equipment and so forth, were the prices already agreed upon for this equipment and sundry matters that you delivered, before Sunday the 8th? A. Not all the equipment, no, Mr. O'Brien.

Q. Well, what equipment didn't appear to be— A. We agreed on July 5th for the life preservers and the chairs.

Q. Yes? A. And the fire extinguishers.

Testimony of Charles E. Gardner, Cross

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Q. Yes? A. And the rest of the equipment was agreed upon at the date of delivery on July 8th.

Q. All right. Now may I just go back a moment?

The Court: That's agreed on the prices?

The Witness: Yes, your Honor. July 8th, yes.

Q. May I go back just—

The Court: Wait. That was on July—

The Witness: First on July 5th—

The Court: July 5th.

The Witness: —it was agreed, and then on July 8th for the miscellaneous items we agreed on—

The Court: Well, for the—

Mr. O'Brien: For the balance.

The Court: —life preservers,—

The Witness: And chairs and fire extinguishers,—

Q. That was agreed upon July 5th, as I understand it. A. July 5th, yes, Mr. O'Brien.

Q. Now, did you say that Mr. Fuchs had difficulty in getting life preservers? A. I said that Mr. Fuchs told me he had difficulty.

Q. I see. Now coming to July 8th, do I understand that there was this category of deck equipment, as you call it, that was agreed upon Sunday, July 8th? A. That's right.

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Q. Mops, brooms, paint— A. Paint—

Q. —and so on? A. —heaving wires, brushes.

Q. Well, now, Mr. Gardner, isn't it a fact that you on your own volition put all this equipment aboard the Calvert? That is, the life preservers, the chairs, the deck equipment and sundry items that you tell us about? A. No, sir, it is not a fact.

Q. All right. Of course all this equipment was owned by the Sandy Hook, Inc., wasn't it? A. Not at the time of delivery.

Mr. Wittner: Just a minute, just a minute. If your Honor please, not only have we been over it but our position is—

The Court: It had been on the Sandy Hook and you got it from the Sandy Hook.

The Witness: That's right, your Honor; some of it, some of it.

Q. It was part of the equipment of the Sandy Hook and belonged to the Sandy Hook, Inc., did it not?

Mr. Wittner: I object to that as immaterial. It has been established that regardless of to whom it belonged at that time, he had permission to take it.

The Court: No, it has not been established to my satisfaction yet that is the principle we are going to follow.

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Mr. Wittner: All right.

The Court: I am going to take this as the fact only: that the material, the life preservers, some of the life preservers and the chairs and the rope?—

The Witness: Rope, your Honor.

The Court: —and the aluminum—

The Witness: Gangplank,

The Court: —gangplank, were taken from the Sandy Hook—

The Witness: Yes, your Honor.

The Court: —and you say that at the time you had authorization to take it. Now from whom did you have that authorization?

The Witness: May I answer it, your Honor?

Mr. O'Brien: Yes.

The Court: Well, what do you think I am asking the question for?

The Witness: Well, Mr. O'Brien—

The Court: Oh, no, don't mind Mr. O'Brien. Mr. O'Brien isn't going to shut me up.

Mr. O'Brien: No, no, I am just motioning to Mr. Dunham not to disturb me. I want to listen.

The Court: No, no, you answer my question. All right, go ahead.

I know what you are doing. You wanted to hear what was going on here.

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Mr. O'Brien: That's right, you Honor.

The Witness: I had the authorization—

The Court: From whom?

The Witness: From several people.

The Court: From whom?

The Witness: From the Monmouth Park track that held the first mortgage, from the Hill interest which held the second mortgage, from the Court, the Federal District Court, Southern District, New York, Referee Kurtz, who represented the action in court or in whose court the action—

The Court: The Referee?

The Witness: Yes, your Honor. And also from my associate stockholders in the Sandy Hook.

Mr. O'Brien: May I—

Mr. Wittner: Just one second, please.

Mr. O'Brien: All right.

Mr. Wittner: I also have the bill of sale, the subsequent bill of sale.

The Court: I don't care about that. You can get that in later, if you want.

Mr. Wittner: I just thought I would complete that chain.

The Court: I know; you have said it before and I haven't forgotten it.

Mr. O'Brien: Well, then, can we agree on it?

The Court: I haven't forgotten it.

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Mr. O'Brien: Can we agree on it? the bill of sale from the—

Mr. Wittner: Trustee?

Mr. O'Brien: No, not the Trustee. Well, may I proceed here.

Mr. Wittner: I will produce the original now, if you want it.

The Court: No.

Mr. Wittner: I still intend to.

The Court: You go ahead, Mr. O'Brien.

Q. Now, Mr. Gardner, as I understand it, the Sandy Hook was conveyed to you and your associates some four or five in number by the Central Railroad of New Jersey in or about 1947. A. That's right.

Q. Yes. And then when was the Sandy Hook, Inc. incorporated?

Mr. Wittner: Well, that's immaterial. We are going into some other history now. I object to it.

The Court: What is the—

Mr. O'Brien: I will withdraw that question.

The Court: All right.

Q. Is it not a fact that your associates, after you purchased the Sandy Hook, that is, Daniel Healy, Charles Gardner, Adam Lamont, John M. Gardner, your brother, and John Golday,— didn't all these interests, some five in number, convey the Sandy Hook to the corporation known as Sandy Hook, Inc.?

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The Court: When was this?

Mr. Wittner: In 1947, your Honor.

Mr. O'Brien: That was on the 8th day of April, 19—

The Court: So what? So what?

Mr. O'Brien: Pardon me?

The Court: So what? The Sandy Hook Company owned it. I don't think there is any question about that.

Mr. O'Brien: All right.

Q. And then by that bill of sale, Mr. Gardner, didn't you sell and convey to the corporation all its equipment, all its furniture, all its fixtures,—A. We conveyed the vessel to the corporation.

Mr. Wittner: Just a minute, Mr. Gardner.

Q. I ask you to look at this—

The Court: When you sold the Sandy Hook to the corporation did you sell it lock, stock and barrel, equipment and everything else?

The Witness: Well, we sold the vessel. I don't believe we sold the equipment, because many of them were our personal items.

The Court: All right; all right.

Q. Will you look at this photostat copy of the bill of sale of the old vessel Sandy Hook and tell me whether this bill of sale was not signed and executed on the 8th day of April, 1947?

Mr. Wittner: That's objected to, if your Honor
(220)
please. It is entirely immaterial. I take the position that it is a matter of law. It doesn't make any

difference what happened in 1947—

The Court: It makes a difference if they sold the equipment. He says they did not sell the equipment. Now let's find out whether they did or not.

Mr. O'Brien: That's what I am exploring, your Honor.

The Court: Let's find out whether they did or not.

Q. Just look at that bill of sale, please. A. What was your question? I have forgotten it.

The Court: Go ahead.

Q. My question is, wasn't that bill of sale—

The Court: Is that the bill of sale from—

Mr. O'Brien: From your associates—

The Court: —the individuals to the company?

The Witness: To the company, yes, your Honor.

The Court: All right.

The Witness: It apparently is.

Mr. O'Brien: And that was in April 1947.

Have you got a certificate that that is on file?

Mr. Dunham: We are subpoenaing the original from the Customs House.

Mr. O'Brien: I mean haven't you got a certificate to show that that is a photostatic copy?

Mr. Wittner: Oh, I am not questioning that it is an accurate photostat.

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Mr. O'Brien: It is.

Mr. Wittner: I am not going to be technical about that, Mr. O'Brien.

Mr. O'Brien: All right.

The Court: This seems to be the sale of the steamer or vessel. Now is there anything else in

there that includes the equipment, Mr. O'Brien? Specifically. Don't tell me what your conclusion may be about the effect of that document but whether it is referred to specifically.

Mr. Wittner: It does not, your Honor.

Mr. O'Brien: Wait a minute, please.

Mr. Wittner: Excuse me.

Mr. Dunham: May I show him, your Honor, where it is?

The Court: No, go ahead. Take it down there and look it over. Let him look it over, too, and see what you can get out of it between you.

Mr. O'Brien: Thank you.

The Court: It seems to me it says the vessel or boat, whatever you call it, Sandy Hook, free and clear of all liens— including certain liens.

(Counsel examined the document aside.)

Q. Mr. Gardner, may I refer you to the bottom of this photostatic copy—

The Court: Suppose you refer it to me and let me look it over, too.

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Mr. O'Brien: Yes, your Honor. May I refer you to that part down there (indicating)?

The Court: Yes. ". . . the said steamer or vessel, together with the whole of the masts, bowsprit, sails, boats, anchors, cables, tackle, furniture and all other necessary thereunto appertaining and belonging."

Mr. O'Brien: I offer this in evidence.

The Court: Have it marked for identification now and offer it in evidence on your own case.

Mr. O'Brien: All right.

Testimony of Charles E. Gardner, Cross

The Clerk: Marked Respondent's 2 for identification.

Q. Now, thereafter, Mr. Gardner, and in 1948, the early part of 1948, did not the Sandy Hook, Inc., by you its president, mortgage the SS Sandy Hook together with all its equipment, furniture, fixtures, to the Monmouth Park Jockey Club?

Mr. Wittner: That's objected to as immaterial, if your Honor please.

The Court: No, I think I will hear it.

A. In 1948?

Q. 1948. A. I don't think so.

Q. Well, I show you this photostatic copy from the United States Customs Service, a mortgage on a vessel, which has been certified to as a certified copy of that on record. A. Well, this is not 1948.

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Q. Did I make a mistake in the year?

The Court: When was it? When was it?

A. I think—

Q. What is it, '47? A. No, it was September 1, 1949, I believe.

Q. Well, look on the back there, Mr. Gardner. I think you will find the year '48. A. Maybe I am wrong.

Q. Perhaps I can help you, sir. A. I don't remember it in 1948.

Q. Isn't that the 12th day of January, 1948? down here? A. Yes, it is the 12th day of January, 1948.

Q. Yes. A. That's right. That's what it says. I thought it was later than that.

Q. Now at the time of this—

The Court: Let me see it.

Mr. O'Brien: Excuse me, Judge.

The Court: It has the acknowledgment the same date, the 12th of January.

Mr. O'Brien: Yes.

Q. At the time, Mr. Gardner, that this mortgage was taken on the SS Sandy Hook, did that not cover everything on the Sandy Hook, lock, stock and barrel?

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Mr. Wittner: I submit the document speaks for itself.

Mr. O'Brien: All right. Then I offer it in evidence.

The Court: Have it marked for identification.

Mr. O'Brien: I would like to have it marked for identification.

The Clerk: Marked Respondent's 3 for identification.

Q. Now, subsequently and in the same year on the 11th day of October, 1948, did not you, Mr. Gardner, as president of the SS Sandy Hook, Inc., execute a mortgage on the vessel SS Sandy Hook to one Evelyn Hill which covered the vessel, her engines, boilers, machines, furniture, and all other appurtenances? A. (No answer.)

Q. I show you the photostatic copy of that mortgage which was filed in the Customs House. A. That's right, I executed this document.

Q. That was October, you see the date here, that was as of October— A. 1948.

Q. October, 1948. And then by that mortgage—that covered the furniture—

Mr. Wittner: Well, I think the document speaks for itself.

Mr. O'Brien: You are right; you are right. I would like to have this marked for identification.

The Court: Mark it for identification.

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The Clerk: Marked Respondent's 4 for identification.

Q. Now there isn't any question about that, is there.

Mr. Wittner: I object to that.

Mr. O'Brien: All right.

Well, now I offer them in evidence, your Honor.

The Court: Well, we have a rule in this District, I don't know whether it obtains in New York—you see, I am at a loss as to what you "big shots" from New York do before the Judges in New York but we have a rule here that you put in evidence matters only on your own case; you mark them for identification until that time.

Mr. O'Brien: That is perfectly all right, your Honor. We'll follow through.

The Court: It leaves it in a situation so that if you desire not to submit it later, you may not do so.

* * *

Q. Well, now, Mr. Gardner, you told his Honor that on July 5th or July 2d you represented to Mr. Fuchs that you owned all this equipment personally, did you not? A. I didn't represent that on July 2d.

Q. Well, how about the 5th? A. On the 5th I didn't represent that I owned every specific item that is mentioned here but the bulk of the items, yes; the life preservers, that I could—I told him I could sell them to him.

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Q. All right. A. That's right. That's what I told Mr. Fuchs.

Q. But as you testified, I think, last Friday, you said that you would have to contact your associates as to whether or not you could take the equipment, take all this equipment, off the Sandy Hook; wasn't that your testimony? A. I told him on July 3d that I would attempt to get this material, that I will contact the people that I have to and I will let him know on July 5th.

Q. But didn't you use the words "I will contact my associates"? Don't you remember on Friday you said "I will have to contact my associates"? A. Yes, that's—

Mr. Wittner: Just a minute. Read it, if you have it, because I think he said associates and others.

Mr. O'Brien: Well, all right; I will accept the amendment—associates and others.

Mr. Wittner: Other parties interested, I think he said.

Q. Well, and others, about the removal of this equipment from the Sandy Hook; was that your testimony?

Mr. Wittner: If you have it, will you read it, please?

Mr. O'Brien: Well, I can't find it here but I took a note of it and it really is here. I wouldn't misrepresent that.

The Court: Of course I have taken just very brief notes on this but I have a memorandum here that on July 3d he got in touch with the people

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connected with the Chapter XI proceedings. Now I don't know what he actually said.

Mr. Wittner: I think he said "parties interested."

The Court: Probably, probably.

Mr. O'Brien: Well, I have a note here that I took on it.

The Court: Suppose your partner looks it up to see what he actually said.

Mr. O'Brien: All right.

Q. Will you accept that answer, that you contacted your associates and others?

Mr. Wittner: Well, I think he said "parties interested."

Mr. O'Brien: All right, I will take that: and "parties interested," about the removal of all this equipment from the Sandy Hook.

Q. That's your testimony. A. I think it was, Mr. O'Brien.

Q. Yes. Now, first of all, who were your associates? A. The stockholders that had an interest in the Sandy Hook.

Q. Stockholders of Sandy Hook, Inc. A. That's right, sir.

Q. And the Monmouth Jockey Club, who held the mortgage? A. The Monmouth Park Jockey Club.

Q. The Monmouth Park Jockey Club. A. The Federal District Court.

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Q. Let's get that. The Monmouth Park Jockey Club [illegible] A. Well, which one you prefer.

Q. I mean taking it in order. Your associates, who were the stockholders of Sandy Hook; the Monmouth Park Jockey Club, who held a mortgage on the vessel; and also Evelyn Hill, who also had that second mortgage. Is that right? A. That's right.

Q. Now who else did you get in touch with or contact? A. The Federal Court.

Q. Well, who? A. Referee Kurtz.

Q. Sir? A. Referee Kurtz.

Q. Well, who was the Trustee at that time?

Mr. Wittner: There was no Trustee.
Mr. O'Brien: All right, all right.
The Court: There was no Trustee?
The Witness: No.
Mr. Wittner: Not until July 31st.
Mr. O'Brien: Not until July 31st?
Mr. Wittner: That's right, sir. I have the original, photostatic copy of the order.
Mr. O'Brien: July 31st, '51?
Mr. Wittner: '51, Yes, sir.

Q. Well, you filed this proceeding, Mr. Gardner, of the

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88 Sandy Hook, as I remember, in the fall of 1949, didn't you? A. Yes, I think you are right.

Mr. Wittner: Chapter XI.
Mr. O'Brien: Yes, under Chapter XI.

Q. October 17, 1949, or thereabouts. A. I think you are right.
Q. Is that right? A. Yes.
Q. And at that time you were permitted to operate the Sandy Hook as a debtor in possession. A. That's right.
Q. Right? A. That's right.
Q. Now, did you go to the Referee to get any order from the Referee with respect to removal of all this equipment from the Sandy Hook? A. I went to— I called the attorneys and they had—
Q. No, I asked you did you go to the Referee? A. Not personally, no. The attorney went.

* * *

Q. Wait, please. Was there any order permitting the transfer of this equipment from the Sandy Hook?

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Mr. Wittner: Objected to as immaterial, if your Honor please. Of course your Honor is familiar with my position in the case. I say by reason of all these things they are not in a position to question title.

The Court: All right, go ahead.

Mr. Wittner: We are going now into something that is immaterial.

The Court: I know your contention.

Q. May I have the answer?

The Court: Was there any order that you know of issued by the Referee?

The Witness: A written order, you mean, your Honor?

The Court: Yes.

The Witness: No, it was granted in open court.

The Court: In open court?

The Witness: Yes, your Honor.

Q. Was it an order of the Court? A. Well, in the meeting; I don't know if you would call it that, the correct terminology—

Q. All right. A. —but the attorneys for the mortgage people were there and the Referee was there.

Q. All right, all right; I'll accept that. Now thereafter, Mr. Gardner, did you not purchase all this equipment and pay $500 to the Trustee in bankruptcy? A. Well, I didn't

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purchase it in that respect. I consulted with my attorney and he advised me to. I don't know what the legal terminology of that is but—

Q. All I am asking you is, in ordinary lay language, didn't you offer $500 for all this equipment that you took off the Sandy Hook and that was approved and the order

signed by the Referee? A. I don't know whether it was for the equipment or for the Trustee's title.

The Court: That's a matter of record, isn't it?

Mr. O'Brien: Yes.

The Court: Well, don't ask; you needn't ask.

Mr. Wittner: I am going to offer the bill of sale.

The Court: All right.

Mr. O'Brien: Have you got it?

Mr. Wittner: Yes, I have the original.

The Court: If you have it you might offer it now because this is part of your case.

Mr. Wittner: Yes.

The Court: Mark it in evidence.

The Clerk: This exhibit is marked Libellant's 1 in evidence.

* * *

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Q. Now that was in 1953, was it not?

The Court: It speaks for itself, doesn't it?

Mr. O'Brien: Yes, that's right. Do you have any objection to this order?

Mr. Wittner: What counsel is offering now, and I have a photostat of it too, is the order authorizing it. There is no question that this was done pursuant to authority and it is merely encumbering the record and I want to keep the record as free of encumbrances as possible.

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The Court: Will you specify that the bill of sale was in pursuance of authorization by—the Referee, was it?

Mr. O'Brien: The Referee in bankruptcy.

Mr. Wittner: Yes.

The Court: All right.

Testimony of Charles E. Gardner, Cross

Q. I show you, Mr. Gardner, the original petition filed in the Southern District of New York of the SS Sandy Hook, signed by you as president. Is that your signature?

Mr. Wittner: A petition for what? the Chapter XI—

Mr. O'Brien: Yes.

Mr. Wittner: —or the Chandler Act.

Mr. O'Brien: Chapter XI.

Mr. Wittner: It is immaterial and we are encumbering the record with a great deal of material not pertinent to this issue.

The Court: Well, there doesn't seem to be any question that there was a Chapter XI proceeding which was initiated by the company with this man signing as president.

Mr. O'Brien: That's right.

The Court: In the bankruptcy court in New York.

Mr. O'Brien: That's right.

The Court: Is that what you want to prove now?

Mr. O'Brien: Yes, that's right.

The Court: Well, that's admitted, isn't it?

Mr. Wittner: Yes, he testified to it the first day.

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The Court: Put the date. What date was it?

Q. Was that, Mr. Gardner, on the 17th day of October, 1949? A. Yes, sir, it was.

Q. You see that date there; and at that time—

The Court: And as I understand it, subsequent to that the company was permitted to remain a debtor in possession.

Mr. O'Brien: That's right.

The Court: And to operate the Sandy Hook.

Mr. O'Brien: That's right.

Testimony of Charles E. Gardner, Cross

The Court: How long was the Sandy Hook operated under that arrangement?

The Witness: From November 1949 until July 1951

Mr. Wittner: July 31 is the exact date. And if I may be permitted now, I intended to do it later, I forgot it when I originally examined him— I have the photostat of the order of adjudication dated July 31; I would like to offer that.

The Court: Well, if you don't want to clutter the record—if you don't want your opponent to clutter the record don't you clutter it.

Mr. Wittner: If this date will be accepted that's all I want.

Mr. O'Brien: No, it isn't clear to me, your Honor, this: as to how long the owner in possession operated the Sandy Hook.

The Court: That's what I asked him.

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The Witness: From November—

Mr. O'Brien: From November?

The Witness: Approximately November 1949 until—

Mr. O'Brien: '49? Oh, I see.

The Court '49.

The Witness: '49, until approximately July 1951, of the year that we are talking about.

The Court: July when?

The Witness: I presume it was the end of July or somewhere in there. I am not sure of the date of adjudication.

The Court How long was it operated, actually operated?

The Witness: Oh, as a steamer, as a going—?

The Court: Yes.

Mr. O'Brien: Yes.

The Witness: It operated for the season 1950 and then did not operate for the season— it's a seasonal operation—

Mr. O'Brien: That's right.

The Court: Well, when was the last time it operated?

Mr. O'Brien: In 1950.

The Witness: In 1950, sometime in September.

The Court: Then it was laid up.

The Witness: Yes, your Honor.

The Court: And it was not operated again.

The Witness: That's right.

Mr. O'Brien: That's right.

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Mr. Wittner: I wonder if we will now fix the date of adjudication so we won't have to break in some other time when we will have lost the trend of it.

The Court: Maybe Mr. O'Brien will—

Mr. O'Brien: You mean adjudication as bankrupt itself?

Mr. Wittner: Yes. It is July 31, 1951 (tendering).

Mr. O'Brien: I don't think there is any objection to that. That's the record.

Mr. Dunham: Then why not stipulate the date?

Mr. Wittner: Yes, that's all I am asking.

The Court: That the adjudication was entered on July 31, 1951.

Mr. Wittner: That's right.

Mr. O'Brien: That's right, your Honor; that's right.

Q. Now, Mr. Gardner, when the SS Sandy Hook operated as a debtor in possession in 1950, did you keep records

of the passengers and the profits and so forth? A. Yes, sir, I did.

Q. Have you got— A. Well, I didn't personally but—

Q. I don't mean that, but in the regular course of business the corporation did, I presume. A. Yes, they did.

Q. Well, have you got them in court? A. Well, the court— they were court records.

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Q. Have you got them here in court? A. I have a statement here in court that shows the business that was—

The Court: What do you want? What do you want?

Q. Have you got the records of the operation of the Sandy Hook for that season, 1950, from New York to Atlantic Highlands? A. I have the records—

Q. The number of passengers it carried,— A. Yes, I have—

Q. —the amount of business that was done at the bar, the dining room, counter, and so forth? A. I think I have testified to that.

Q. Where are the records?

The Court: Have you got the records here?
The Witness: Yes, I—
The Court: All right, all right.
The Witness: I mean the records—
The Court: Yes, yes, they are here.

Q. You have those records. A. Yes.

Q. For 19— A. Passenger fares and bar receipts and various—

Q. For 1950. A. Yes, Mr. O'Brien.

* * *

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Mr. O'Brien: Well, to save time, your Honor, would we be able to examine those records later some other time?

The Court: Yes. There is no objection, is there?

Mr. Wittner: I have no objection, sir.

Mr. O'Brien: All right.

Q. Now included or embraced in those records of the operation for the Sandy Hook for the season of 1950, have you got the charter parties? A. Yes, we have that, too. That shows the charter parties.

Q. Night sails, excursions, and so forth? A. Yes, that's all—

Q. All right. A. I don't have a lot of the original records because they subsequently went with the Sandy Hook file in court; the Sandy Hook records were all handed over to the Court, the Southern District Court, but I do have records showing the charters but they are not the original charter parties themselves.

Q. All right. And you will let us look at those? A. Oh, certainly; certainly.

Q. All right. Now, coming to Monday, Mr. Gardner, the 9th of July, you told us, this is my recollection, that the Sunshine came back on Monday with 100 additional life preservers; is that right? A. Well, I wasn't sure whether—I know they made another trip—whether it was Sunday night or Monday morning, I am not quite sure

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of that.

Q. Yes. A. I know they did make—

The Court: You weren't on the second trip.

The Witness: No, I wasn't, your Honor.

Q. All right. A. But they made a second trip.

Q. All right. And was it life preservers only? A. No, I think that there was— Mr. Fuchs said he needed 100 more life preservers and it was specifically for that reasons that they went back, sir.

Q. Is that all it carried that time? A. Yes.

Q. Now, was there any memorandum of that hundred life preservers, or any other material that was delivered by the Sunshine either off the Sandy Hook or off the Sunshine itself? A. No, I didn't give him a memorandum on that hundred at that time because I wasn't with that trip.

The Court: I seem to remember that you said that when you gave a memorandum to Mr. Fuchs for checking up, he returned it—in your last testimony.

The Witness: He,—no, I think he—he told me that he would not have enough life preservers—

The Court: I think you testified that he returned it.

The Witness: Well, I don't recall getting it

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back, your Honor. I don't recall ever getting the memorandum back.

Q. So then we come down to the day that the Coast Guard inspectors were to come over, which would be the following Monday, July 9th, for the inspection, that is the fire drill and the boat drill. A. Well, I really didn't know what—

The Court: Were you there?

The Witness: No; no, your Honor.

The Court: All right.

Q. Oh, you weren't there? A. No.

Q. Well, weren't you there at all on Monday, July 9th?

A. No, I called up the yard, I called up Captain Jenks on Monday, if that's what you mean.

Q. Is that the time you told Captain Jenks to tell Fuchs that you couldn't get the money? A. No.

Q. Isn't that so? A. That isn't so, Mr. O'Brien. Of course it isn't.

Q. All right. Weren't you in the Bethlehem yard Monday, July 9th, Monday evening? A. I was not in Bethlehem on July 9th, to the best of my recollection. I certainly was not, because I called there late in the afternoon and talked to the captain, by phone.

Q. Well, were you at the bethlehem yard on the evening

of July 5th? A. July 5th is possible. I could have stopped there on the way back from the track.

Q. All right. Now, coming to July 10th, which was on Tuesday, were you aware of the fact that over Monday night this davit was repaired by the Bethlehem company? A. On Tuesday?

Q. Well, Monday night; that is early Tuesday morning. A. I din't know about it Monday night but I did know about it on Tuesday afternoon or sometime when I called the captain.

Q. All right, what time did you get there Tuesday? A. Well, it was either Tuesday or Wednesday, I am not sure. It was in the afternoon.

Q. And was that— A. Probably about 4 o'clock in the afternoon.

Q. Four o'clock. A. Four-thirty.

Q. I see. And at that time were you waiting to have the Coast Guard inspection? A. I was waiting for Mr. Fuchs to get the certificate, if that's what you mean.

Q. Was Mr. Fuchs waiting for you to sign the charter? A. He wouldn't expect me to until he had a certificate.

Q. Did he ask you to sign the charter? A. There was no charter there.

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The Court: Did you see him?

The Witness: I seen Mr. Fuchs, yes, your Honor.

The Court: All right. Now was there any discussion of the signing of the charter at that time?

The Witness: No, your Honor, there was not.

The Court: There was not. This was on what date?

The Witness: This was on either the 10th or the 11th of July.

Q. That would be Tuesday or Wednesday of July. A. That's right, Mr. O'Brien.

Q. Well, did Mr. Fuchs ask you for any money? A. No, he did not. He didn't mention money at all. No, sir, he did not.

Q. Did you offer him any money? A. No, I told him I had money with me, that I would give it to him if he had a Coast Guard certificate.

Q. Where did you get the money? A. Well, I borrowed part of it. I borrowed some of it. The money that I had that particular day? I borrowed some money.

Q. Well, was it from the Jockey Club? A. No, no, no. I could have gotten money from them.

Q. Well, didn't you say the Jockey Club was your bank account? Didn't you tell that to Mr. Fuchs some time before? A. I don't know if I have ever told it to Mr. Fuchs but it's true, the Jockey Club were—

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Q. Your bank account? A. —very generous with me, if that's what you mean, in business relations.

Q. Well, didn't you say the Monmouth Park Jockey Club was your bank account? A. (No answer)

Q. Do you remember that? A. Probably I have said that.

Q. All right. A. I wouldn't doubt that in the least.

Q. All right. So then when you came over to the Bethlehem yard on Tuesday or Wednesday,— A. Yes.

Q. —did you show Mr. Fuchs any money? A. There was—

Q. Now that's a simple question. Did you take the money out and say "Here's the dough, here's cash"? A. No, because I—

All right, all right. A. I am sorry. I didn't do that—

Q. Now, where did you get that money, sir? A. Well, I got thirty-five hundred—

Mr. Wittner: If your Honor please, I think that is immaterial since Fuchs was not ready and didn't have the certificate—

The Court: All right, where did you get it?

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Wait a minute. Where did you get it?

The Witness: Well, your Honor, I got it from Luke Lynch, I got part of it from Luke Lynch, who was also a member of the Sandy Hook Lines and a very personal friend of mine, and the rest of it my brother and I had, the money.

The Court: All right.

Q. I am sorry. Luke Lynch was connected with the Sandy Hook Lines? A. He was connected—

Q. In what capacity was he connected? A. He was the comptroller and he was—he was the treasurer in effect but not the treasurer in name; his brother was the treasurer.

Q. Was it Sandy Hook money or was it Luke Lynch's money? A. No, no, it was his personal money.

Q. His personal money. A. Yes, sir.

Q. Well, didn't you tell Fuchs that you were going to get this money from the Monmouth Club? A. I told Mr. Fuchs early in our negotiations that I could get any amount of money I needed from Monmouth, if there would be any moneys needed—that's what I told him, and I am sure I could have.

Q. Now, as I remember, you testified that this Sunshine carried three hundred and some odd passengers; is that right? A. I don't think that many.

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Q. Well, how many? A. I don't think that many.

Q. How many? A. I think two hundred would be closer to it.

Q. Two hundred. And you say that Mr. Fuchs agreed to pay you, agreed to pay the Sunshine, your brother and yourself, $300 for the charter of that vessel for this Sunday, July 6th. A. That's right. That's right.

Q. Now, did Mr. Fuchs and yourself discuss the schedule that the Calvert was to run from New York to Sandy Hook, or to Atlantic Highlands?

* * *

A. Not specifically the schedule itself, except that it was to run in the harbor of New York under a license. The charter trips could hardly be determined at that time, any way, in any event, in one conversation, what times they would run.

Q. What I am getting at, Mr. Gardner,—

The Court: No, was there any discussion of the schedule you were going to use?

The Witness: Oh, yes, your Honor,—

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The Court: For going down to Atlantic Highlands?

The Witness: Yes; it was in a broad sense, that we left around noon and we finished up about—

Q. Where did you leave—excuse me—where did you leave, Mr. Gardner, at noon? A. Not noon; I said about noon. It was 11:15 actually.

Q. 11:15 where? Pier 83, North River? A. Pier 90.

Q. Pier 90. All right. And that was at 11:15? A. 11:15.

Q. And then you made a stop where? A. At 69th Street.

Q. At 69th Street, Brooklyn. A. Brooklyn.

Q. All right. You would have— A. We would have made a stop there.

Q. All right. I mean assuming that it was fast— A. If the boat was fast enough, we—

Q. Yes; and then from 69th Street, Brooklyn, did you make any stop between that and Atlantic Highlands? A. No, went directly to Atlantic Highlands.

Q. All right. Did you know—was the Motor Vessel Calvert as fast as the Sandy Hook? A. I believe she was as fast as we used the Sandy Hook as such. The Sandy Hook was capable of much more speed than we have ever used it at.

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Q. Did you know the speed of the Calvert?

The Court: Did you know the speed at which you expected her to run?

The Witness: Yes; I knew only the estimated speed, your Honor.

The Court: What?

The Witness: Mr. Fuchs told me that she would do probably twelve or thirteen knots.

Q. Well, now, what was the running time of the Sandy Hook, for instance, from Pier 90, stopping at 69th Street,

Brooklyn, down to Atlantic Highlands? A. Pier 80. All right, let me think and I'll give it to you. Making a stop at 69th street.

Q. That's right. A. All right. That would be about, oh, a little under two hours or two—depending on the tide.

Q. All right. A. If you had flood tide it would probably be a difference of five minutes or so.

Q. All right. What time did the race track open? A. I think two-o'clock.

Q. The first race was at two o'clock. A. I believe so. Or two-thirty. I am not certain.

Q. All right. What time— A. Two-thirty was the first

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race.

Q. All right. What time did the Sandy Hook arrive down there? A. Oh, about ten after one, something like that; a quarter after one at the latest.

Q. And then after you got off, after the customers or the passengers got off the Sandy Hook,—

The Court: You had to get a bus to get to the track.

Q. You had to get a bus to take you to the track. A. Yes.

Q. How long did that take? A. Oh, about twelve or thirteen minutes, fifteen minutes.

Q. All right. Now, do you know how long the Calvert would take to make that run? A. If it did twelve knots I know how long it would take.

Q. And then you—

The Court: What did you run the Sandy Hook at, about twelve?

The Witness: About twelve and a half or thirteen knots.

The Court: Twelve and a half or thirteen knots?
The Witness: Yes, your Honor.

Q. Now, after you got to Atlantic Highlands, what time did the Sandy Hook leave the Highlands to go back to New York on this [illegible] that you were talking about? A. Oh, in the afternoon?

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Q. Yes. A. Two fifteen.

Q. Did that make a stop at 69th street, Brooklyn? A. No, that went directly through.

Q. Directly to Pier 39— A. Yes.

Q. —in the North River. And what time was it due there? A. Well, it wasn't due at any—it was due when it got there, actually, you know.

Q. All right. About, about? A. It didn't maintain a strict schedule. It was due to leave at five fifteen, but it used to drag a little—it used to leave about five twenty-five fifteen, to give the commuters a chance. We would get there approximately, oh, twenty to seven, a quarter to seven.

Q. Wait a minute. You would get back to Pier 39 about what time; four thirty? A. We [illegible] get to Pier [illegible]

Q. From two fifteen from Atlantic Highlands— A. We would make that a slow trip. We used to count on that trip.

Q. All right. A. We would get up there probably about four thirty.

Q. All right. A. Somewhere about that.

Q. Then you left there at five [illegible] A. That's right.

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Q. Went back to Atlantic Highlands, and then you took the race track crowd back—at what time? A. Whenever the—we used to have to wait for the last race.

The Court: Well, about how long?

Testimony of Charles E. Gardner, Cross

Q. About how long? A. I would say that on the average it would be about seven twenty or seven thirty before the last cruise would come over.

Q. All right, all right. Now, did you know whether the Calvert would be able to make that schedule? A. Oh, I knew it could, yes; if it did twelve knots it certainly could. I was convinced to me that it would do twelve knots. My only conviction that it would do it.

Q. I see. A. Certainly I expected it would do it. If it didn't do twelve knots we would have modified our schedule, that's all.

Q. Now, isn't it a fact that all your discussions with Mr. Fuchs for the chartering of the Calvert were merely for the racing season of some twenty-eight days, up to August 8, 1951? A. No, Mr. O'Brien, no; that is not so. We had charters for that season.

* * *

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Q. Wasn't the chartering based upon those dates, namely, from some time in July, about July 11th, when the certificate was obtained from the Coast Guard, up to August 8th? A. It was based on that as a daily rate and thereafter it was to be chartered on the basis of how many charters I could secure for it.

Q. Wasn't your discussion with Mr. Fuchs that after August 8th, when and if you needed the Calvert for moonlight or for excursions, that then you would call on him and he would give it to you at $400 a day? A. No, the discussion was that the boat would be available to me until Labor Day when and as I needed it after the race tract season at $400 a day, and when she didn't run in that period, those days she didn't run there would be no charter fee.

Testimony of Charles E. Gardner, Cross

Q. I think you said, Mr. Gardner, that you had an agreement with the concessionaire Mr. Hill or Mrs. Hill that you were to get 25 per cent of the gross bar receipts; is that right? A. That's right.

Q. And that you were to get 20 per cent of the— A. Gross food receipts.

Q. Gross food receipts. Now, do you remember when you signed your interrogatories that you made a schedule of the gross income from the bar? I show you a copy of the interrogatories which I have in my possession. A. Yes.

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Q. I call your attention to these figures, if you please. A. Yes.

Q. To and from race track, minimum of $800 per day for 26 days, $20,800. For afternoon sails at two forty per day for 26 trips, $6,240. A. Yes.

Q. For 24 moonlight sails from July 10th to September 4th at four eighty per sail, $11,520. For 4 Sunday day charters at four eighty each, what's that, $1920. A. Yes.

Q. For 21 day charters from August 9th to September 4th, at $480, $10,080. A. Yes.

Q. Now we are talking about the receipts from the bar; right? A. That's right.

Q. Well, you have underneath that, less bar cost, 40 per cent of gross. What do you mean by that? A. Well, that's patently an error. When my attorney asked me how much it cost, how much would the bar cost be on an operation of this type I told him it would run about 40 per cent of gross, when he was computing these figures back there. In other words, for every dollar that you take in on the bar it is going to cost you 40 cents to get that dollar in

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Q. Is that what— A. In other words, there would be approximtely 60 per cent profit in an operation of this type; there would be 60 per cent profit.

Testimony of Charles E. Gardner, Cross

Q. And you were to get— A. 25 per cent.

Q. You were supposed to get 25 per cent of the gross? A. 25 per cent of the gross.

Q. Which would mean—

The Court: Not 25 per cent of the 60.
The Witness: No, your Honor.
The Court: 25 per cent of the gross.
The Witness: 25 per cent of the gross, yes, sir.

Q. Which would leave— A. Which leaves about 35 per cent, you mean, for the concessionaire? Well, he makes a lot of money but he has got the headaches.

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* * *

Q. Before the recess, Mr. Gardner, my last question was concerning the bar business on the Sandy Hook, and I showed you a copy of your interrogatories and particularly pointed out to you less bar cost, 40 per cent of gross; right? A. That's right.

Q. You said that was an error. A. Well, it is not exactly an error, that's about what the cost would be—

Q. Yes. A. —but it shouldn't be set up in that way, I don't believe.

Q. Well, doesn't the gross here amount to $50,560? A. Yes, the gross amounts to fifty thousand there.

Q. You are charging us with your net gain of $30,336, which would be 60 per cent of the gross, not 25, isn't that so? A. Well, that would be the— this thirty thousand represents what would be profit.

Q. Yes, but on fifty thousand gross you are not at 25 per cent going to make thirty thousand, are you? A. No, no, but the bar will show that much profit. That's all I—

Q. I am asking you, in your interrogatories here where you charge us with your profit of $30,336 on a gross of fifty thousand, five sixty—

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The Court: That would be a mistake if it is 25 per cent.

The Witness: Yes, it should be—

Q. Around $12,000, shouldn't it? A. Yes, it would be—

Mr. Wittner: I believe the original was corrected.

Mr. O'Brien: Wait a minute, now. I don't want this. Let me hear from Mr. Gardner.

Q. In other words, you are not charging us thirty thousand on a fifty thousand gross, are you? A. No, I think that just shows the amount of profit.

Q. It means that 25 per cent on fifty thousand would be about— A. That would be, would represent, our profit, the boat profit.

Q. —twelve thousand?

The Court: Twelve thousand five hundred.

The Witness: Yes, your Honor.

Q. Not thirty as you said here and swore to. A. Except that thirty would be the profit.

Q. Except that you made a mistake and put down thirty instead of 25 per cent of fifty, which would be twelve, or twelve five; right? A. I guess you are right about it.

Q. All right.

The Court: Well, it is indubitable that 25 per

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cent of fifty would be twelve thousand five hundred.

Mr. O'Brien: That's right.

Q. What effort, if any, did you make to get a boat to replace the Calvert? A. Well, I had travelled Florida up to Hyannis, Massachusetts, on the eastern seaboard, exam-

ined all the boats that would be adaptable for the run, and at the time that the boat was withdrawn first I called up the only operator in the harbor that I knew had a boat that might be available, the Mesock Line, and asked him if he could charter his boat to me and—

Q. Well, excuse me for interrupting you but you said, as I recall, that you called up New England, on your testimony here on Friday. A. Yes.

Q. Did you not? A. Yes.

Mr. Wittner: He didn't here; he did that at the—

Mr. O'Brien: Well, I will read it. Wait a minute.

Q. Let me read it to you, page 31.

"Now, did you do anything about getting another boat or was there one available?

"Answer: I tried, I called up, I called up New England, checked on the Yankee up there," —

A. Yes.

Q. —"and checked on her speed, she was too slow."

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Who is New England? A. Well, I actually called Frank Barrett about the Yankee.

Q. And where was the Yankee? A. The Yankee? I believe at the time—I didn't go there at this time, I simply called about it, and—

Q. Well, you said you called. A. I believe she was in New London.

Q. All right. A. I am not sure. She was—

Q. How large was the Yankee? A. I think she carried—I believe it was somewhere around nine hundred or a thousand passengers; somewhere in there.

Q. All right. And then you say that you went to see John Meseck. A. That's right.

Q. Well, when did you go to see him? A. On July 12th or 13th, I presume. It was after the boat was withdrawn.

Q. Did you make any deal with Meseck? A. I tried to but he wouldn't—

Q. He wouldn't deal with you, would he? A. No,—

Mr. Wittner: I object to that, if your Honor please. That calls for a continuation.

The Court: Yes.

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A. (Continuing) He didn't refuse to deal with me. He told me, he says "I'll make the run myself." That's what he said.

Q. I mean you didn't have anything to do with the arrangement between John Meseck and the Monmouth Park Jockey Club, did you? A. Oh, I must have had something to do with it.

Q. Well, what did you do? A. I told John Meseck that Mr. Fuchs had withdrawn the Calvert and that the run—

Q. What did you do with respect to—

Mr. Wittner: Let him finish, please.

The Court: Wait a minute. Did you try to charter a boat from Meseck?

The Witness: Yes, your Honor, I called—

The Court: Did you tell him what for?

The Witness: For the purposes of making this run when the Calvert was withdrawn.

The Court: All right. What did Meseck say?

The Witness: He says "No," he says, "I'll make the run myself." He says he'll make the run down there, not the boat chartered to me but on his own; he'll operate the run himself.

Q. Now what boat was it? A. The Americana.

Testimony of Charles E. Gardner, Cross

Q. The Americana. A. I don't know—I don't know that he would have used the Americana on every occasion.

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Q. All right. A. But it was the Americana that was in mind.

Q. That's a large boat. A. Yes.

Q. It is a steamboat. A. It is a big steamboat.

Q. All right. Now what did you have to do, if anything, with the arrangement that Mr. Meseck made about running his boat to Atlantic Highlands? A. Well, the only thing I had to do with it was that that was my run and I was concerned about it and I asked Mr. Meseck if he had a boat available for the run.

The Court: But when Meseck decided to run it himself, did you have anything further to do with it or was it his dealing with the race track?

The Witness: Nothing beyond calling the track and telling them that Meseck would run, make the runs, that's all.

Q. And farther than that— A. I didn't—

Q. All right. A. —even go on the boat.

Q. All right. Meseck made the run, did he, and that was his deal that he made with the track.

The Court: Did you have a cut in this?

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The Witness: No, your Honor.

Q. Do you know how many passengers he carried?

The Court: I don't care how many passengers he carried.

A. I don't know.

Mr. O'Brien: Well, I mean this is on the question of damages. It has to do with—

The Court: I know, but if you have a ship. How many passengers did the Americana carry?

The Witness: The Americana carried, I think, 2700.

The Court: Did it every carry passengers to the track?

The Witness: I guess it may have on Saturdays.

The Court: No, no; do you know?

The Witness: Not to my knowledge. I am not running.

The Court: Do you know the number of passengers carried on Saturdays or other days?

The Witness: I don't know his exact figures but I know that he carried more than the season before during that period.

Mr. O'Brien: Wait a minute. May I ask a question, Judge?

The Court: Yes.

Q. The Americana, John Mesock's boat,— A. Yes.

Q. —was the boat that was used to carry the customers to the track. A. Yes.

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Q. Beginning sometime in July of '51. A. Yes.

Q. And he continued until the close of the meet, which was August 9th. A. That's right.

Q. And his boat, the Americana, or whatever boat he used, only made the trip from New York to Atlantic Highlands to accommodate the track customers, isn't that so? A. That is so.

Q. All right. A. And to make money, of course.

Q. Now, do you know—

The Court: I don't think that Mr. Mesick, if he operated it in the harbor, is sufficiently disinterested of disposition to place himself at the service of the race track for just charity's sweet sake; he ran it to make money.

The Witness: Yes, your Honor.

Q. And he made it, didn't he? A. Yes, I know he made money on the run.

Mr. O'Brien: That was a little facetious, your Honor; I didn't mean that.

Q. Do you know what his average number of passengers was in 1951 from July 12, or whatever date he started, until August 26th? A. Well, his average, I could only estimate by the overall—

Q. By what? A. By the overall. I had called up the track and asked them how many passengers were carried.

Q. Oh, I am not asking you about the track. I am asking you—

The Court: Well, do you know of your own knowledge—

Q. —whether you know of your own knowledge—

The Court: —how many passengers the Americana carried?

Q. —know what the records of the Mesick steamship line show.

The Witness: I would only be able to gage it—

The Court: Do you know approximately?

The Witness: I think I could just approximate it, your Honor.

Q. You never saw the records, did you? A. No, I never saw Mr. Masseck's records.

Q. All right. A. I never saw his records—

Q. That's what I am referring to. A. —but you can also get that figure from the tickets, the number of tickets sold.

Q. I am referring to Mr. Masseck's records of passengers carried. A. No, I never looked at Mr. Masseck's records.

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Q. All right, all right.

Mr. Dunham: May I ask another question on behalf of Sound Steamship Line?

The Court: Yes.

By Mr. Dunham:

Q. I believe you claim that you had delivery of this vessel, do you not, at sometime?

The Court: Claim what?

Mr. Dunham: Delivery of this vessel.

Mr. Wittner: What vessel.

Mr. Dunham: The Calvert.

Mr. Wittner: I don't understand it.

A. I don't know what you mean, Mr. Dunham.

Q. Did you have delivery of the Calvert? A. Oh, I thought you asked if I had delivered the vessel itself.

Q. Delivery of the vessel.

Mr. Wittner: I think, your Honor, that is a technical legal question, on the question of what constitutes delivery.

Testimony of Charles E. Gardner, Cross

The Court: Do you claim that there had been actual delivery to him by Tuohe in accordance with the vessel statutes or what do you mean?

Mr. Dunham: I believe he contends that he had delivery of the vessel and I want to ask him that. I asked him that in the examination before trial and [illegible] he said yes, and I want to have it on this record, what he claims, whether he did have delivery or he did [illegible]

Mr. Dunham: Your Honor has the facts. I think whether there was delivery or not is a legal question that your Honor will have to determine.

The Court: I don't know that I have all the facts yet.

Mr. Dunham: I want to know what he claims, what his contention is—he is going these two as corporations; what his contention is.

The Court: Well, I think I would much prefer to leave that factual situation and then pass on the legal question myself.

Mr. Wilson: That's right.

Mr. Dunham: Your Honor, I admit that's going to set a legal question—

The Court: What? You don't think it is a legal question whether there was delivery or not?

Mr. Dunham: It's legal, of course,—

The Court: All right,—

Mr. Dunham: —but I would like the man to state—

The Court: All right, then it is a question for me.

Mr. Dunham: It's only a question about what he contends.

The Court: I don't care what he contends.

Mr. Dunham: All right; then I will ask him—

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The Court: Suppose he contended that stealing wasn't a crime? That doesn't make it so.

Mr. Dunham: All right, then I will ask him these questions, your Honor, for the purpose of posing the question.

Q. Now on the 10th, on the 10th of July, 1951, did you post any notice showing that you were charterer of the vessel? A. On the 10th of July, 1951?

Q. Did you have any notice posted whatsoever? A. No, Mr. Dunham.

Q. Did you have any notice to creditors who was the owner and who was the charterer, that you were the charterer? did you do that? A. I had no—no such thing.

Q. Well, you know that's the duty of a charterer, don't you? That is the regular, established custom or practice? A. I presume if—

Q. What's that? A. If that's the duty after you get a charter party that's certainly the duty.

Q. You didn't do that, did you? A. I didn't have a charter party.

Q. Did you pay your men? A. Oh, I paid my men. Any men that worked for me, I paid them.

Q. Did you pay those men that were working, that were

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on that vessel, all of them? A. Yes, I paid them.

Q. You are sure of that? A. Well, I'm quite sure but I could—I mean I might owe somebody something, I don't know. I have never heard anybody say I did, in that respect.

Q. Weren't they complaining to you and Mr. Fuchs because they didn't get paid? A. Oh, no, they certainly did not complain to me and Mr. Fuchs. And they were only on there three days, three or four days, so I don't

think anybody was looking for their pay. They may have wanted some advances.

Q. On the 10th did you present any cover notes to Mr. Parks? A. No, I certainly didn't present any.

Q. On the 10th did you present any kind of a hull and machinery insurance policy?

Mr. Wittner: I will object to that, if your Honor please. He wasn't required to do that until a certificate of inspection was delivered.

The Court: Well, let him say no. You are wasting more time by your objection than it would take him to answer.

Mr. Wittner: That's right, sir.

A. No, I didn't.

Q. No.

The Court: We know the answer anyhow.

Q. Did you conduct an inventory of consumable stores, (367) such as fuel oil, lubricating oil and packing for the engine? Did you do that? A. No, I did not.

Q. Did you—this is with regard to the 10th, the 10th of July, 1951. A. That's right.

Q. And did you conduct any inventory of equipment and gear? A. No, I did not.

Q. Do you say you had an oiler aboard? A. I did not understand you.

Q. Do you say that you had an oiler aboard that vessel those three days? A. Yes, we had somebody there that was an oiler.

Q. Will you give us his name? A. Well, I can probably give you his name if I can look at my records.

Testimony of Charles E. Gardner, Cross

Q. Well, will you give us that later on, after we get through with this cross-examination, look at them? A. I think I have already given you that, haven't I, Mr. Dunham?

Q. Have you given the oiler's name? A. I am not sure. I thought so. I will get it for you.

Q. And will you give us the deckhands' names? A. Yes.

Q. How many did you have? A. Three and a boatswain; four.

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Q. Will you give us the boatswain's name? A. Yes.

Q. Will you give us the name of the chief mate?

The Court: Will you give him the name of everybody in the crew that you had put on there.

The Witness: Yes, sir.

Q. Now we go back to the 9th. On the 9th did you make any inventory of the consumable stores or the equipment or anything? A. No,—

Mr. Wittner: He already asked about that, a minute ago.

Mr. Dunham: That was the 10th.

A. I wasn't on the vessel on the 9th, to my knowledge.

The Court: Did you ever make any inventory?

The Witness: No, your Honor, I never made any inventory of anything on there except the merchandise that was delivered over there.

Q. Now you say that you put Captain Jenks and your men on on what day particularly? A. On July 8th, on Sunday.

Testimony of Charles E. Gardner, Cross

Q. July 8th. Now on that day did you present any cover notes to Mr. Fuchs or to the Sound? A. No, I never presented any, any date.

Q. And as I understand it, you presented no insurance policies so Mr. Fuchs could tell whether it was a good policy

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or not? A. You could never get a policy then, you know.

Q. What is that? A. It takes three months to get an insurance policy.

Q. I mean for your hull and machinery. A. It takes three months, two or three months.

Q. Did you even tell him the name of the insurance company, whether it was to be an Americantime Institute hull policy or what kind of a policy it was to be? Did you tell him that? A. I told him it was Despard.

Q. Well, that's a broker. You didn't tell him the name of the policy, did you? A. I just told him it was Lloyds of London. I told him it was the same insurance I had on the Sandy Hook, when we discussed insurance.

Q. You showed him it was Lloyds, the policy? A. I told him London Salvage carried our insurance on the Sandy Hook through Despard.

Q. Did you tell Mr. Fuchs that you would have an Americantime Institute hull policy for him when you took the vessel? A. I never mentioned that word at all; never.

Q. Now on the 8th did you post any sign or any notice at all on the vessel showing you were the charterer and

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that he was the owner? or Sound was the owner? A. I didn't do that on the 8th or any other day.

Q. As a matter of fact, you did nothing that a charterer would do, did you, except bring men aboard? A. I did nothing—no.

Mr. Wittner: I object. That question contains a lot of assumptions. I object to it.

The Court: I think he has answered no; a straight flat, simple "No."

Q. Is that your answer, no? A. That's right, Mr. Dunham.

Q. Now do you have those cards here you had in your hand yesterday indicating some charter party to some club or institute or committee? A. I have a list of them. I have made them so we can read them easily.

Q. Well, I thought you showed us cards on Friday. Didn't you?

The Court: Have you got the cards, to?

The Witness: I haven't them with me, your Honor, but I went and separated everything and drew it up in order—

The Court: All right, bring the cards tomorrow as well as this list.

Q. Do you have the cards today, Mr. Gardner? A. I don't have them.

The Court: He said no.

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Q. You left them home, right? A. No, I dug through all this charter business so I—

The Court: Look: He said no, he didn't have the cards. He dug through; he made this list. Good heavens!

Q. Can you give us the name of any club or committee to which you claim you chartered the Calvert? A. I can give you them all, Mr. Dunham.

Q. How many are there? A. That's why I worked on this. There were—specifically for the Calvert there were nine charters embracing 23 sails.

Q. Were those written charters? A. Yes, I guess most of these were written charters.

Q. That was the average, the usual form you used to make a charter party for a moonlight sail or some such affair? A. In certain instances yes, in others no.

Q. Well, do you have those charter parties? A. I have —I think there are some here; they are not all here. These were made and written out in the Sandy Hook offices, 141 Broadway.

Q. And—

Mr. Wittner: Just a minute. If your Honor please, I don't think he finished.

A. And at the time that they were made out there, they were put in those files, because we were working very closely with Sandy Hook. This was taking Sandy Hook's place on

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the run, and the entire files from Sandy Hook were moved from that office over to a warehouse in New York, where I presume the charters are still reposing, most of them, in the vaults.

Q. Now with regard to those nine charters—and you say 23 runs? A. That's right.

Q. Of the Calvert. A. Yes, sir.

Q. Did any of those charter parties have the name Calvert on it? A. Yes, of course they did.

Q. And when were they made out? A. They were made out—well, probably on July 6th, July 8th, July 10th, on those dates.

Q. So you were busy getting those charters on those dates, is that right? A. No, these charters already were

secured as to being prospects. We were busy then telling them that we had a boat and that we had a date for them. That's all we had to do with these. The ground work had all been laid for these charters. I am not trying to intimate that we got those charters on a moment's notice.

Q. I understand; your ground work occurred in February, right. A. In some cases, and in some cases it was in June and July, as we went along.

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Q. Now you say that some of those written charter parties have the name Calvert on them; is that right? A. I am not certain of it because I myself did not type out the charter parties, there was a girl in the office that did that, but I do know this:—

Q. In what office? In what office? The Sandy Hook office? A. In the office at 141 Broadway, that's right.

Q. In the offices at 141 Broadway. A. Yes.

Q. And how long had you had your office there? A. Oh, at that point I think it had been there about two years.

Q. And you were using these offices which were paid for by the estate, were they not? the bankrupt estate? A. Not entirely, no.

Q. Well, you were using them to get these charters. A. We were using the offices.

Q. Yes. A. But you said they were paid for by the estate. I said they were not entirely paid for by the estate.

Q. The rent, I mean. A. The rent was not entirely paid for by the estate.

Q. Who paid the rent? you? A. No, not me personally, but there was a double office there and there was another company there.

Q. How many girls did you have? A. One girl.

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Q. And you paid half of her salary? A. No, I didn't pay any part of her salary, personally, at all.

Q. She was paid by the Sandy Hook estate. A. That's right.

Q. And you— A. Not by the Sandy Hook estate, no.

Q. Well, by whom? A. Oh, the estate of the Sandy Hook; you mean during the reorganization she was paid.

Q. While you were a debtor in possession. A. Yes, that's right; she was paid then.

Q. And you obtained— A. But I might add that she hadn't been paid at this time, if that's what you mean. She wasn't paid by Sandy Hook. She was getting no pay at this time.

Q. I admit, I know that a good many of them got no pay. A. No, there wasn't but she—

Q. What's that? A. No, there wasn't. I was one of them that didn't get paid.

Q. You were testifying now that these charter parties of the Calvert were stowed away in a storehouse somewhere? A. No, I don't say that. I say that in some instances part of the records that would pertain to this are put away but we in turn have other records to show you which charters these are.

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Q. You turned the Sandy Hook records or the proposed charters over to the bankruptcy Referee or the estate, is that true? A. Well, they took the entire files out of that office, that's true.

Q. That's the Sandy Hook files. A. Yes; all the files that were in there.

Q. And did that have in it some of these charters for the summer of the Sandy Hook? A. Yes, it had some of the Sandy Hook charters in there; I know that.

Q. And when did you get those? A. Oh, at various times we got them. I don't know exactly the dates that these were secured, any of them.

Q. When was your Coast Guard inspection of the Hook? A. Of the Hook? Well, you get charters before the inspection. You don't wait for inspection to get charters, to do any business.

Q. Now on some of these Calvert charter parties did you take any deposits? A. Only in one instance—no, in several instances, we returned several deposits, in several instances. There was something like I think $3,000 or $4,000 roughly that was returned.

Q. You got $500 a charter party, didn't you? Isn't that the usual on that situation, the usual deposits, $500? A. No, we would take—it depended on the people that were

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chartering the boat. In some cases we would take no deposits, people that we had been doing business with for several years.

The Court: Were there any deposits on these charters that you later assigned to the Calvert?

The Witness: Yes, there were some deposits, your Honor, and they range from 10 per cent up to 25 per cent, very seldom more than 25 per cent.

Q. Well, are you prepared to tell his Honor who those nine charterers were? A. Yes. I have them listed in order.

Q. Were some of them colored churches, colored congregations? A. Can I give them to you quickly?

Q. Yes. A. Marty Atman—that's a man that chartered the boat, the Sandy Hook, also in 1950, had seven moonlight sails.

Q. I am speaking of 1951. He didn't have the Calvert in 1951, you don't claim, do you? A. He had it in 1951,

the Calvert—he would have had it, had it run. The Azalea Club, that's Manhattan,—

Q. Where are they from? A. Manhattan.

Q. What is the address of the Azalea? A. Oh, I think their headquarters are downtown somewhere around 42d Street in midtown.

Q. Have you got a charter party for the Azalea? A.

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No. I only have the record of it.

Q. Well, do you have a card for them? A. Possibly, yes. I can get the address.

Q. Will you bring the card tomorrow? A. Oh, I can definitely get you their address: I know that.

Q. Will you bring your cards tomorrow?

The Court: Bring all those cards tomorrow.

A. Sure, sure.

Q. You will bring the cards for the various charterers tomorrow, will you? A. Well, here is the Zampella Association in Jersey City.

The Court: The Zampella Association?

The Witness: Yes. And I got in so much trouble for not producing a boat that I almost lost my life.

Q. Did you take a deposit from that association?

The Court: If I know Zampella you got in trouble, Brother.

The Witness: I was in trouble, your Honor, I can assure you. I live in Jersey City and they came up and came in my living room and I thought I was going to die.

Q. Did you take a deposit? A. No, I wouldn't take a deposit from them. They are old friends of mine.

Q. Did you take a deposit from the colored church in Brooklyn? The colored people have a colored church in

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Brooklyn, haven't they? A. Oh, there are so many colored churches in Brooklyn that I don't know which one you are referring to.

The Court: Just bring those that you had deposits on.

The Witness: Yes, your Honor.

The Court: Bring the cards tomorrow and bring the amounts of the deposits.

Q. Now on the five hundred dollar deposits, did you get some five hundred dollar deposits? A. No, I don't think we ever got that much of a deposit.

Q. A hundred? A. They vary in amounts; up to I would say—

Q. Two hundred? A. In some cases three hundred. That would be 25 per cent of the amounts.

Q. In each instance did you return the money, the three hundred? A. In any instances where I dealt for the Calvert the money was returned.

Q. You are sure of that. A. Oh, I am certain of that. I didn't return it personally. The girl in the office took care of that.

Q. Have you any idea what your payroll was for those three days for the men on the Calvert? A. Yes. Well, it would—

The Court: When you get the names of the men

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which you are going to give counsel, you will also bring with you the amounts that were paid them for the three days.

The Witness: Yes, sir.

Q. And also you will bring with you, will you, what you paid for the payroll taxes?

Mr. Wittner: Payroll taxes on what boat?

Mr. Dunham: For the men; the U.S., and if you paid New York State taxes—

The Witness: You are not required to pay—

Mr. Dunham: What's that?

The Witness: You are not required to pay payroll taxes for casual labor, two days' work. You are not required to pay that.

Q. You didn't pay any taxes. A. I am sure I didn't. I mean I'll admit that right here in open court. That's casual —two days' employment or three days or a day, whatever it was; I simply paid the men.

Q. But you didn't pay any taxes for them, any U.S. taxes, no withholding tax?

The Court: No, he says it's casual employment—

The Witness: It's casual employment.

The Court: —and no tax is necessary so he didn't pay it.

* * *

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Q. Did you have compensation insurance for them in case they got hurt? A. Yes, that—oh, that would be covered under your P. and I., when you had that. At the time that they went on the vessel I assumed Mr. Fuchs had the insurance; they were working for him.

Q. Do you mean to say that the compensation would be covered by P. and I.? A. Well, didn't Mr. Fuchs have insurance on them?

Q. You know different than that, don't you?

Mr. Wittner: I object to that.

A. That he didn't have insurance? I assumed he had it. He said he did.

Q. Don't you know that P. and I. doesn't cover compensation insurance? A. Well, I assumed—

The Court: He said he assumed that Mr. Fuchs had insurance for these men because he said he did.

Now do I understand you correctly?

The Witness: That's right, your Honor, yes.

Q. Will you bring your income tax returns also? A. No, I won't bring those.

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Q. For '51?

Mr. Wittner: Whose income tax return?

Mr. Dunham: His; for '51.

The Court: What do you want his income tax return for?

Mr. Wittner: Oh, I will object to that.

Mr. Dunham: (Aside, to Mr. Wagner): You don't want them? Do you want to cancel them?

He is the one that asked for them.

You don't want them?

Mr. Wagner: I think the income tax records should be produced—

Mr. Dunham: Yes.

Mr. Wagner: —of the Sandy Hook.

The Court: For the Sandy Hook, not his personal income tax records.

Mr. Wagner: No, no, for the Sandy Hook; because he testified on direct examination as to what the Sandy Hook made the previous year as a basis for proving the loss of profits in 1951.

The Court: Well, if you want those records there is a way of getting them.

Mr. Wittner: He can't get those.

Mr. Wagner: Well, he could produce copies of the Sandy Hook records.

Mr. Wittner: How would he have them?

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The Court: I don't know whether he has them or not.

Mr. Wittner: The Trustee in bankruptcy, I suppose, would have them.

The Court: Probably the Trustee has all the records.

The Witness: I don't have them. I know they had such a tax loss in previous years that—

* * *

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Q. Now, with regard to these alleged or proposed charters of the M/V Calvert: I think you said yesterday you were quite sure that the Calvert was in some of these written charters, is that right? charter parties, is that right? A. I am not certain but I assume that she must have been in some of them, yes.

Q. You just assume it. A. Yes, because I didn't actually draw the papers themselves.

Q. Well, is the lady here that drew the papers? A. She is here.

Q. And at that time she was on the payroll of the bankrupt Hook, Sandy Hook.

Mr. Wittner: In the first place, it's not bankrupt anyway.

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The Court: She was on the payroll of the Sandy Hook estate.

Mr. Dunham: Yes, the estate.

A. Part of the time but not all of the time.

Q. And what is her name, may I ask? A. Mrs. Helga Lynch, H-e-l-g-a.

Q. Isn't she related to Lynch, the comptroller? A. That's right, she is his wife.

Q. The one you borrowed the five thousand of? A. I borrowed part of the five thousand—

Mr. Wittner: The witness didn't say five thousand.

The Court: Part of the five thousand. I don't think there is any dispute about it.

Q. Part of the five thousand; whatever you borrowed. A. Yes.

Q. Did he work in the office all the time? A. Not all the time, no.

Q. He worked on the vessel part of the time. A. Part of the time he was on the vessel, part of the time he was in the office.

Q. And part of the time when the old vessel was running, he acted as some member of the crew there, did he not? A. No, he never acted as a member of the crew.

Q. What did he do, sell tickets? A. He may have sold tickets on some occasions. He was not the regular ticket seller.

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The Court: What did he ordinarily do?

The Witness: He was the comptroller. He took care of the accounts and the money, your Honor. He wasn't on the boat, he was in the office; we had purser on the boat.

Q. Now you had a couple of other deck hands, I believe you mentioned in your examination before trail— not other but a couple of deck hands. Golday, was he a deckhand? A. Which vessel are you referring to?

Testimony of Charles E. Gardner, Cross

Q. On the Hook. A. Oh, you are talking about the Sandy Hook.

The Court: What are you concerned about that for?

A. I had 63 men on the Sandy Hook.

Mr. Dunham: What is that?

The Court: What are you concerned about the Sandy Hook for?

Mr. Dunham: The expenses.

The Court: How many men did you have on the Sandy Hook?

The Witness: Sixty-three all together, your Honor.

The Court: You are not going through 63, I hope.

Mr. Dunham: No, indeed.

The Court: No.

Q. But I believe that Golday, who was supposed to be the boatswain on the Calvert, was on the Sandy Hook, wasn't? A. No, your are wrong. He was not supposed to be the boatswain on the Calvert nor was he the boatswain on the Sandy Hook.

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Q. What was he supposed to be on the Calvert? A. Nothing; he had nothing to do with the Calvert at all.

Q. Wasn't he aboard? A. He was never on the Calvert to my knowledge, Mr. Dunham.

Q. Golday? A. Never, unless he had been on without me knowing it, some other year or some other time.

The Court: He wasn't part of this crew that you brought?

The Witness: No, your Honor, he was not.

The Court: All right, all right.

Q. How about Healy? Was he aboard the Calvert? A. Healy was aboard the Calvert.

Q. What was he, a deck hand? A. No, he was not a deckhand.

Q. What was he? A. He was just— he was not a member of the crew— he was just there to help, assist, get the vessel certificated.

Q. Well, did you pay him wages? A. No, I didn't pay him any wages.

Q. How about Lohman? Did you pay him wages? A. No, I never paid Lohman any wages.

Q. What did he do? Just drive you around? A. Well, I don't know what else he did but he drove me on those occasions I went to the yard.

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Q. And what is he, a relation to you? A. No, not that I know of.

The Court: What has all this to do with the question we are concerned with?

Mr. Dunham: Well, he is in the court-room. He is going to be a witness.

The Court: Well, suppose he is in the court-room? So what? If you get him on the stand you can cross-examine him.

Q. Now, I believe you said yesterday you would try to have the names of some of these men that worked on there. Do you have them today? A. Yes, sir, I have them.

Q. Can you give them to us? A. Yes, sir, I can. Eldred Jenks, Master,—

Testimony of Charles E. Gardner, Cross

Q. Now may I interrupt you one moment. How long did he work for you? Did he work for you on the Sunshine? A. He didn't actually work for me on the Sunshine but he has been on the Sunshine and navigated it, yes.

Q. He worked for you and your brother, didn't he?

The Court: Now just answer me. What has that to do with this issue?

Mr. Dunham: Well, I understand that Captain Jenks brought the Sunshine— that was his testimony— into the Bethlehem yard there with the Calvert but I won't pursue it, your Honor.

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The Court: Let's just try to keep it to the issue here.

Mr. Dunham: Yes; all right.

Q. Now what is your next one? A. Harry Quillan, pilot.

Q. What's the next one? A. Edward Sukir.

Q. What was his rating? what was his duty? A. Mate.

Q. Mate. A. J. Erhardt.

Q. Do you have addresses for any of these men? A. Yes, most of them.

Q. Would you mind giving me the address when you give the name? A. Oiler. I will go back then so as not to confuse it.

Q. Well, from now on. This last one, what was he? Erhardt. A. 25 South Street.

Q. What was he, again? A. Oiler.

Q. Oiler. And has he worked for you since then? A. No, he has never worked for me since.

Q. And how many days do you say he worked for you as an oiler? A. I paid him for three days.

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Q. You did? A. Yes, sir.

Q. Now what was the next one? A. R. Wilson.

Q. What did he do? A. He was deck.

Q. What's his address? A. I don't have his street address. I have Keansburg, New Jersey.

Q. What's the next one? A. F. O'Brien.

Q. He was a deck man? A. He was a deck man. He is Keansburg, too.

Q. Keansburg? A. That's right.

Q. And you paid him three days? A. Three days, that's right.

Q. And as I understand, no social security: right? A. None whatsoever.

Q. How about Captain Jenks? Did you pay him social security? A. No, sir, I did not. I paid him his—the money I gave him but I didn't withhold, if that's what you mean.

Q. Yes. A. I did not.

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Q. What is the next one? A. D. O'Brien.

Q. Where from? A. Keansburg.

Q. And he was a deck man? A. Yes.

Q. Deckhand? A. That's right. The next is B. Garland, Dwight Street, Jersey City.

Q. Do you have the number of Dwight Street? A. No. Boatswain.

Q. And what did you pay him? A. $60, four days.

Q. What's your next one? A. Well, that's eight men. We had no chief engineer, as you know. I did not give you the addresses of the first few. Shall I give them to you?

Q. Yes, if you will, please. A. Eldred Jenks' address is 119 Columbia Avenue, Jersey City, New Jersey. You would like the addresses as of the time they were on the vessel, I presume. That's the only addresses I have, but I do know that—

The Court: Give the only addresses you have, then.

The Witness: Well, I know he has moved since then.

The Court: All right, he has moved. Do you know where?

The Witness: Bloomfield, New Jersey.

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Q. All right. What's the next one? A. The next one is Harry Quillan. That's 196 Jackson Avenue, Jersey City, New Jersey.

Q. What's your next one? A. That's the sum total of them.

Q. Now you understood, did you not, that the crew was to be thirteen? A. No, I did not. I assumed that the crew was to be eight or nine.

Q. You didn't consider this, then, a skeleton crew that you had? A. I didn't consider it a crew of any sort until such time as we got the certificate. They were just there to assist Mr. Fuchs.

Q. I merely asked if you considered it a skeleton crew. Can't you answer it yes or no? A. Oh, I don't consider it, no, I don't consider it a skeleton crew at all.

Q. You consider it a full crew? A. No, I don't consider it a full crew.

Q. How many other men should you have to a crew? A. Mr. Fuchs told me that the vessel—

Q. No, I don't want—

The Court: The vessel was not in operation for

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a full crew at any time. Now I don't care how many men he needed for a full crew.

Mr. Dunham: All right.

The Court: He said that he brought enough men

to enable Mr. Fuchs at his request to conduct the necessary operations for the Coast Guard examination.

Is that the fact?

The Witness: That's the fact; except the chief engineer, your Honor.

The Court: Except the chief engineer.

The Witness: That's right.

The Court: That's what I understood from your testimony.

The Witness: Yes, sir.

Q. Now just to correct this wrong impression: You know that Mr. Fuchs can't conduct a boat drill, don't you?

Mr. Wittner: Well, now, —

A. Not by himself, I know that, not single-handedly.

Mr. Wittner: I couldn't object and I have refrained but I think sometimes it saves time to object because we have been over all this so much and it is immaterial at this point anyway.

The Court: Well, we have been over it a great deal. I have been very tolerant so far but I am likely to explode at any moment.

Mr. Dunham: I won't pursue it.

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Q. Now with respect to those cards, will you just let me see those cards you had? A. I think I showed them to you already.

Q. I haven't seen them. A. Mr. O'Brien examined them for an hour.

Q. Will you let me see them? A. Or for half an hour. They are here if you want them. Do you want me to come down there and had them to you?

Testimony of Charles E. Gardner, Cross

The Court: Look: Go up and get them. You stay on the stand. You are required there.

Q. Can you pick out any Calvert cards, Mr. Gardner? A. These cards, as I have said before, were for 1950. So the Calvert we did not operate in 1950, so certainly there will be no cards for the Calvert.

Q. Oh, you have no cards for 1951? A. These are only for charters—after they had been completed, these cards were made.

The Court: Have you any charters for 1951, charters which were made in contemplation of some boat of yours running?

The Witness: Yes, your Honor. I brought the original charter book that has 1950 and 1951 charters enumerated in it.

Q. Now this that you are looking at is only a book that somebody made entries in; right? A. That is right.

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Q. And I understood there is nothing in there showing the Calvert. Is that right? A. Yes, there is.

Q. How many entries showing the Calvert, and where are they? Can you point them out? A. All right. Would you like me to enumerate them?

Q. Well, just give the date or something so that we can pin point it and know what it is and what it is about. A. Well, I will give you the names of the charterers, if you like.

The Court: Go ahead, give what you have got there.

The Witness: Well, I have July 13th, July 14th, moonlight sail, Marty Atam; July 15th, Sunday sail, Azalea.

The Court: Does Azalea refer to the Calvert?

The Witness: Yes, your Honor.

The Court: All right.

Q. Is there any entry about the Calvert there, please? A. We have our—

Q. May I see it? May the Judge see it?

The Witness: We have our own codes here, your Honor.

The Court: Speak up now, please.

The Witness: These are for the Calvert, these are the Sandy Hook, these for the Calvert, Sandy Hook, Sandy Hook, and here is the Calvert, Calvert,—

Q. Does it say "Calvert"? A. No. Well, here it does; it says "Calvert" here.

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The Court: These three "Calvert."

The Witness: Yes. And here is the "Calvert". And I myself have broken these down, so as to make it easier, in a separate sheet of paper.

Q. Now is it your testimony that Mrs. Lynch took some information from some written charter parties and put a C in that book? Is that what you want us to understand? A. No; no, she didn't do that.

Q. You did it?

The Court: Who made these entires?

The Witness: Either Mrs. Lynch or myself.

The Court: And they were made from what?

The Witness: From the people accepting the charters.

The Court: From telephone or personal conversations with them, is that it?

The Witness: From various conversations, and when they finally accepted they were entered.

The Court: Now were there any cards such as you showed us the other day?

The Witness: Well, these cards, your Honor, were made after a charter was run, not before, to show you what we took in at the bar.

The Court: Just answer my question. Were there any charters, were there any such documents as you have there in your hand reflecting these particular engagements?

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The Witness: Only in the case where the same charter party had run the previous year, that we had charters for 1951; in some instances, where they were chartered the previous year, then we would have a card for that.

The Court: Do you have a card, any card, which relates to the 1951 recitals in this book for charters of the Calvert?

The Witness: No, your Honor.

The Court: All right.

Q. Now with respect to the written charters, which eventually you say became signed as charter parties, having to do with the Calvert, were there at any time any written papers in existence? A. Yes, they were—

Q. Do you understand the question? A. Yes, I do. Yes.

Q. You have seen many of these charter parties, the forms, haven't you? A. Yes, I have.

Q. And it is customary sometime after you come to a meeting of the minds with this club or this church to write it down or what we call a charter party, is that right? A. That is right.

Q. Yes.

The Court: Do you have any of those for the Calvert?

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The Witness: They are all in the Sandy Hook file, your Honor. They are in the warehouse.

The Court: The Calvert ones, too?

The Witness: The Calvert and Sandy Hook. They are all in one file.

The Court: Why were the Calvert with the Sandy Hook?

The Witness: Well, they were interrelated; inasmuch as we were transferring Sandy Hook charters to the Calvert and in the office they kept it all in one place and at the time the files went down to the warehouse they went down, too, to the warehouse, and I presume they are still there.

Q. May I ask where the warehouse is? A. Well, the warehouse—

The Court: Is that the warehouse in which the Trustee deposited the documents?

The Witness: Yes, your Honor. That was at, I think, Sixth Axenue two blocks above Canal Street.

Q. That's a Government warehouse, as you understand it? A. I don't know. I went there. I got a—

The Court: No, not necessarily. They are deposited in any warehouse that the Trustee sees fit to retain; it is not a Government proceeding.

Mr. Dunham: I guess they hire buildings.

The Witness: I particularly went there to see if there were charter parties there.

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Q. Oh, you did? A. Several years ago.

Q. You say several years ago? A. Yes.

Q. Would that mean before you started this case or after, or when? A. It was after I had started this case. I had gone there to look in the files there at the time.

Q. And you went to find the charters? A. I got a receipt—I mean I got permission from the Court to go.

Q. And you went to look for the charters? We are speaking now of the charter parties of the Calvert for 1951. A. I went not specifically for that reason but I did see some there when I went there.

Q. Oh, you did. A. I seen the charter parties there.

Q. Of the Calvert? A. Well, no, I don't know whether they were Calvert or Sandy Hook. They were all in 1951.

The Court: Were there any of the Calvert?

The Witness: I didn't take them apart, your Honor, at the time. I knew they were all there.

Q. Well, now, will you assist us some way in getting those so we don't have to subpoena them or serve a notice to produce?

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Mr. Wittner: Well, they are Trustee's records and not ours. I don't see what we can do.

The Court: They are not his records.

Mr. Dunham: Well, he said he went there, your Honor.

The Court: I know, it. You can go there, too, if you get permission from the Trustee or the Court.

Mr. Dunham: All right. We will have to subpoena them but I thought we could short-cut it and wind this trial up in no time.

The Court: I know it but the burden is yours.

Mr. Dunham: I realized that.

The Court: If you want those documents, you get them.

Mr. Dunham: I realized that. We will subpoena them, your Honor.

The Court: It is just as easy for you to get them as it is for him.

Mr. Dunham: That's right.

Q. Now, those particular papers known as the charter parties, would you say there are six of them, or seven, or nine, or how many? Can you give us any idea? A. Well, do you mean the number of sailings or number of agreements?

Q. The number of pieces of paper which would be considered charter parties. A. I can give you almost an exact approximation of that.

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Mr. Wittner: Of the Calvert only?

Mr. Dunham: Just the Calvert.

A. These were all going to be run on the Calvert (indicating). There would be approximately twenty some odd.

Q. All right. Now, so that we may describe them in a subpoena ducus tecum, are they on a paper or any kind of a form of the Sandy Hook? A. Yes, they would be on a Sandy Hook form.

Q. Those for the Calvert then you put on a Sandy Hook form; right? A. No, we transferred from the Sandy Hook to the Calvert either by letter or by phone.

Q. No, I am not interested now— A. We made assignments of those charters.

Q. I am interested now in those who signed up for the Calvert, if there are any; did you have them signed on the Sandy Hook paper, letterhead, or— A. No, no, a letter agreement on the Calvert.

Q. A letter agreement on the Calvert. A. That's right.

Q. So that there was no— A. We had no Calvert forms at all printed at that time.

Q. No. So there are no forms having to do with the Calvert; right? A. No Calvert forms, no; that's right.

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Q. You didn't go to a stationery store and buy those forms that they have? A. No, I did not order any forms for the Calvert; that's right.

Q. They were just a plain form; and it's all by letter, right, with respect to the Calvert? A. Yes, because these people had already signed, in many instances.

Q. I am not interested in that; I merely asked you— A. Yes, it was by letter form.

Q. I don't want explanations on and on. A. All right.

Q. It's just a letter, correspondence between you and some club or some church; right? A. In some cases it was by phone, too.

Q. So some you did not reduce to writing, is that right? A. Some we did not reduce to writing for that particular reason, because they had been signed prior to that for the Sandy Hook.

Q. So your understanding is that these papers are in the possession of the Trustee in bankruptcy, right? They were at one time? A. Undoubtedly that's where they are.

Q. And the last you saw them they were in the office which you used as the debtor in possession; right? A. That's right.

Q. Mrs. Lynch was there and she kept the records? A. Yes.

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Q. Did she take the deposits or did you take them? A. The deposits were sent in to the office, either through the mail or if they would come in in person she would take them.

Q. Was there any time when you went to the particular outfit and got a deposit of $300 or $500? A. I may have, Mr. Dunham, where I had closed the contract; I don't recall.

Q. Where you what? Where you what? A. Where I had closed or negotiated a closing I may have done that. I don't recall any particular instances.

Q. Was there any time when you went to the charterer and said "Here is a refund of your three hundred dollar deposit"? A. We did make certain refunds, right.

Q. Did you do it? Now "we", did you? A. I don't know whether I did it personally. I don't remember doing it.

Q. Did you get a notice from Meseck to make a demand on him for the deposit?

Mr. Wittner: Oh, I object to that. He is bringing in the Meseck now and I don't see how Meseck has anything to do with this.

Mr. Dunham: Well, he may have paid them all back. I don't know. I want to try to get the truth here.

Mr. Wittner: Well, what I want to get is the truth.

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The Witness: I can show him that, your Honor. I have got it here.

The Court: Do you recall getting—

The Witness: Off hand?

The Court: Yes.

The Witness: The Sandy Hook at the time had—

The Court: No, do you recall getting any communication from Meseck to the effect that people were asking him for a refund of moneys paid for the charter of the Calvert by you?

The Witness: No, not for the charter of the Calvert. No.

Q. Well, did you get the demands from the people, particularly one colored minister, and did you afterwards pay him three hundred or five hundred dollars? A. I don't recall.

Mr. Wittner: I object to that.

The Court: He says he doesn't recall.

A. I don't recall what you are driving at; I really don't.

Q. All right. Now in your affidavit of August 5, 1952, you made a statement in your affidavit that the "Claimant subsequently removed the ship's papers as a result of which I could not operate the boat and was compelled to yield possession."

Do you recall that in your affidavit? A. Yes, Mr. Dunham.

Q. Your lawyer prepared the affidavit for you?

The Court: He said yes; he said yes.

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Q. Now, were you in this court when this matter was argued before Judge Modarelli as to the lifting of the plaster or the libel or the attachment? A. No, I wasn't.

Q. Did you at any time hear your lawyer tell Judge Modarelli that Mr. Fuchs had stole the enrollment papers? A. I did not. I was not in court.

Q. Now I believe you have discussed here the Dolphin. May I ask you, did you buy the Dolphin; the Dolphin?

Mr. Wittner: Well, now, that's objected to. We are now going into—

The Court: How is this concerned with it?

Mr. Dunham: It is very important, your Honor.

The Court: Well, tell me why.

Mr. Dunham: Well, I'll ask him the very potent question and then your Honor will see.

Q. Didn't you ask the race track or the Jockey Club for $5,000 to buy the Dolphin?

Mr. Wittner: I object to that. It is entirely immaterial.

Mr. Dunham: It is very important, your Honor.

The Court: In what way is it important?

Mr. Dunham: Well,—

The Court: Suppose they gave him five thousand to buy the Dolphin? What about it?

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Mr. Dunham: Why can't I ask him?

The Court: What?

Mr. Dunham: Why can't I ask him?

The Court: Well, I want to know why you are asking him, how it is important. You can ask him any question; you can ask him how far he thinks the moon is away but I want to know what is the relevancy to this case.

Mr. Dunham: That isn't the point, sir. At the same time that he was negotiating for Mr. Fuchs' boat he was negotiating for the Dolphin. He has already testified he was in Florida—

The Court: All right, all right.

Mr. Dunham: —and brought it up—

The Court: Yes, he has testified to that.

Mr. Dunham:—and that's the reason, one of the reasons, why Mr. Fuchs wanted a contract.

The Court: Well, he has testified that under the circumstances he described he was toying around with the idea of the Dolphin. Now whether he got the money or not I don't know; I don't care.

Mr. Dunham: Well, I would like to ask him your Honor, if he got the five thousand from the race track.

The Court: What significance would that have?

Mr. Dunham: I contend it has a good deal of significance.

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The Court: Well, if you think it has you know the reason. Now give me your reason. I am not able to go into your mind and find it. I have got to rely on what you tell me.

Mr. Dunham: There are many reasons.

The Court: Well, give me one.

Mr. Dunham: There is so much confusion about the five thousand.

The Court: Give me one reason. He says it was $5,000 that he had in his pocket at the time, that he borrowed from friends. Now if he got five thousand more from the race track, what difference does it make?

Mr. Dunham: Mr. Mermelstein said that there was five thousand available but they had not passed a resolution.

The Court: He said he didn't give it to him.

Mr. Dunham: What is that?

The Court: He said he didn't give it to him. It was available.

Mr. Dunham: Yes.

Q. Well, were you going in the Bethlehem yard at the time that you were going in about the Calvert, in connection with repairs on the Dolphin?

Mr. Wittner: Well, that's objected to as immaterial. They are again bringing in repairs on the Dolphin.

The Court: Well, if you would just let me know how you think the transaction about the Dolphin is material here it would save a lot of time.

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Mr. Dunham: It is tied in with it all the way through.

The Court: What?

Mr. Dunham: It is tied in, the two vessels are tied in together.

The Court: You say it is tied in. I don't see how it is tied in and I am asking you to tell me how it is tied in.

Mr. Dunham: Well, I have the race track representative coming here and I will show it by their records, your Honor. I will withdraw the question.

The Court: All right; but you won't show it unless you show me it is tied in. That I will guarantee.

Mr. Dunham: All right.

The Court: I have asked you to show me how it is tied in and you haven't answered me.

Mr. Dunham: I tried to answer you.

The Court: No, you said there were a number of things. I asked you to tell me one.

Mr. Dunham: He was negotiating for two vessels, as I understand it, at the same time.

The Court: Suppose he was?

Mr. Dunham: The Dolphin and the Calvert.

The Court: Suppose he was? There is nothing in the law that says you can't negotiate for two vessels.

Mr. Dunham: No, I don't say there is.

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The Court: And they are two entirely different vessels, different capacities.

Was the Dolphin big enough for your purposes for the race track?

The Witness: No. She carried—

The Court: I understood you to say no.

The Witness: She carried just 300, 350, your Honor.

Q. Three hundred and eighty, wasn't it? A. Three hundred and eighty; under four hundred.

Q. And you were going to use her as an auxiliary, weren't you?

Mr. Wittner: Your Honor has ruled several times and yet counsel persists in doing exactly what you ruled against.

Mr. Dunham: All right; let it go.

The Court: Anything further, gentlemen?

Mr. O'Brien: I have just two or three and only that, Judge.

The Court: All right.

By Mr. O'Brien:

Q. Now isn't it a fact that you got this whole $5,000 from Luke Lynch and none of it from any friends of Luke Lynch?

Mr. Wittner: That is objected to. He has been examined on that and he has testified about it.

Mr. O'Brien: I haven't examined him on that.

The Court: No, I will allow it. He said he got

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part of from Luke Lynch and part of it from other people.

Q. And other friends; is that right? A. Yes.

Q. And that's what you say now. A. I got—

Q. And that's what you say now. A. Yes.

Q. All right. Do you remember your examination before trial December 2, 1953 over at the United States District Court? A. Yes.

Testimony of Charles E. Gardner, Cross

Q. Page 39: "Question: And when you said that you had your money with you, how much money did you have with you?

"Answer: $5,500.

"Question: And did you have that in cash?

"Answer: It was in cash.

"Question: And where did you get it?

"Answer: No, it wasn't—yes, it was in cash; yes, it was in cash.

"And where did you get that money?

"Answer: Well, I got that money from a friend of mine.

"Question: Who is the friend?

"Answer: Luke Lynch."

Were not those questions asked of you on that examination and aren't those the answers that you made? A. Yes,

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sir.

Q. You got the $5,000—

Mr. Wittner: He has already answered.

The Court: He said yes.

The Witness: That's right, yes.

Mr. Wittner: He doesn't say he got it all from him.

The Court: No, he was asked "From whom did you get the money?" and he said "From Luke Lynch."

The Witness: Yes. I recall saying that.

Q. These are the answers you made to those questions, are they not?

The Court: He has so testified.

A. That's right.

Q. Now on your examination here the other day did you say that Captain Jenks was present and heard the conversation between Fuchs and yourself about this argument? A. I said he was present.

Q. You did? A. Yes, sir.

Q. Did you say he heard it? A. Well, I didn't know he heard it until I asked him. I wouldn't have known it at the time.

Q. He said he did? A. He did say he heard part of it.

The Court: He said he heard part of it.

The Witness: Yes.

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Q. Do you remember this question on your examination December 2, 1953, on page 40:

"Question: And where did this conversation take place?

"Answer: July 10, on board the Calvert.

"Question: Who was present at the time?

"Answer: The entire crew was there, but they didn't hear it. The only persons that heard what was said were myself. Mr. Lohman and Mr. Fuchs."

Do you remember those questions being asked?

A. Yes, sir.

Q. And did you make those answers? A. Yes, I did. That was my impression at that time?

Q. Did you make those answers? A. Yes, I did; yes, I did.

Q. Did you ever get any money from the race track to charter any boat?

Mr. Wittner: That is objected to.

The Court: I don't care whether he did or not. We are concerned about the money he got to charter this boat.

Mr. O'Brien: On credibility, your Honor?

The Court: On credibility.

Mr. O'Brien: I mean I am only asking that on credibility sir, just for credibility; that's my only purpose.

The Court: I don't think you need to do that. You may do it if you wish.

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Did you ever get any money from the race track?

Q. Didn't you get the money from the Monmouth Park Jockey Club for the purpose of chartering a boat? Yes or no. A. Not for the entire purpose of chartering a boat.

Q. Did you get money from the Jockey— A. Not for that—

Q. —for the purpose of chartering a boat? A. I say not for that entirely, no.

Q. You got $5,000, didn't you? A. I have gotten over $50,000 from the Monmouth race track.

Q. But you got five thousand wired to you down in Florida to charter the Dolphin, didn't you? A. No, I didn't.

Q. All right. A. No. That isn't so; I did not get $5,000 wired to me in Florida.

The Court: All right. Anything further?

Mr. Dunham: Just one question.

The Court: Now we are not going to have a see-saw here. You are finished.

Mr. O'Brien: I am finished, yes.

Mr. Dunham: May I ask a few questions?

The Court: Go ahead, go ahead.

By Mr. Dunham:

Q. On the 11th or the 10th when this crisis came and

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this blow-up and you and Fuchs parted ways—do you recall that day? A. Yes, very well.

Q. You had an argument with him, didn't you? A. It was in the nature of an argument.

Q. Yes. And didn't you call him a son-of-a-gun, an S.O.B., or something like that? A. I may have. I don't recall saying it. I don't know.

Q. Didn't you say that the New York ship fellows were all S.O.B.'s? A. I didn't say that. I would have included myself in the same category so I certainly wouldn't say that.

Q. Didn't you say that he was, Fuchs? A. No, I don't recall saying it, Mr. Dunham.

Q. You don't. Didn't you say that another man you dealt with was? A. No, I don't remember saying it.

Mr. Dunham: That's all.

Redirect Examination by Mr. Wittner:

Q. On the last question or two away, where was Captain Jenks on that last day, when the blow-up came with Fuchs? A. Well, at the time that I was talking to Mr. Fuchs I assumed that the Captain was some feet away from me but he was evidently right behind me.

Q. You have asked him to appear here? A. I have asked him to appear here.

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Q. And has he indicated that he heard part of the conversation? A. He heard part of the conversation.

Q. All right.

The Court: He said he didn't know whether he heard it or not until Captain Jenks—is that his name?

Mr. Wittner: Jenks.
The Court: —told him so.

Q. Now—

The Court: You see, we have whipped more dead horses here than were ever found on any race track in America.

Mr. Dunham: Very good.

Q. Now you were asked about the charters. Without taking too much time can you tell us in dollars and cents how much the charters that you signed up for the Calvert, specifically for the Calvert, amounted to, and how many sails were involved in it, based on the records that you have before you? A. Thirty-two separate sails. The entire total comes to $38,000.

Q. All right. Is that for the Calvert alone or does it include— A. That would have been entirely for the Calvert.

Q. Well, does it include— A. It includes charter sailings that were originally intended for the Sandy Hook but when the Sandy Hook went out we transferred them to the
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Calvert.

Q. Now, in addition to those charters did you run any cruises that were not part of a charter? A. That includes the entire amount. I have included everything here, Mr. Wittner.

Q. All right. Now through the years that you ran the Sandy Hook did you spend money on advertising that route? A. Yes, we did spend money.

Q. And how much money was spent annually in advertising?

Mr. Dunham: I object, your Honor. It is too remote to be proof in this case. It has no probative

value and it is incompetent, irrelevant and immaterial.

The Court: Well, if this was an established run, which it seems to have been, it may go to show, not compellingly, the fact that there was a market for the use of this boat or for the use of a boat going down on that course.

What was your—

The Witness: Well, we started out spending—of course, the first year we spent more, we spent approximately $20,000 the first—

The Court: What was your average expenditure every year for advertising?

The Witness: Our average expenditure would approximate—

The Court: Not the extraordinary first year.

The Witness: Yes. It would approximate eleven

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thousand. However, may I point out that the race track took over our advertising in late 1950. They did that free of charge.

The Court: But you did it—

The Witness: We did it before that, yes, your Honor.

The Court: All right.

Mr. Dunham: It is immaterial then. May I point out to your Honor that there was nothing in the proposed contract or the alleged oral contract saying that—the requirement that these respondents were to pay such damages and—

The Court: The requirement that what?

Mr. Dunham: To pay damages such as he claims here for the absence of having the Calvert during the rest of the summer; and all the cases indicate and I wish to point out from those that there is nothing in

that proposed contract or this written proposed contract, written contract, or the oral contract any way indicating that the respondents were to pay damages if there was not a completion of the contract or if there was not a run of this Calvert.

Mr. Wittner: I don't know what it is all about.

Mr. Dunham: And I move at this time to strike out all of his testimony concerning these moonlight sails and his failure to have the Calvert and resulting damages on that ground, that it is too remote and there is no part of any agreement by which it might be implied that the respondents were to pay damages to this man for lack of profits, even—

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The Court: Certainly it wasn't specifically provided but there are contracts which do not provide for any liquidated damages or even mention damages. They simply make a contract of agreement and if that is violated the resultant damages don't have to be mentioned in the contract.

I will deny your motion.

Mr. Dunham: Now all these estimated damages rest—

The Court: That's for me to determine.

Mr. Dunham: Yes.

The Court: And for you to argue on the questions of law, and not at this time.

Mr. Dunham: Well, on that ground I move to strike out all of his testimony.

The Court: I will deny your motion.

Q. You originated that run to the race track, did you?

A. Yes, I did.

Q. And—

The Court: Look: We have been over this.

Mr. Wittner: All right, sir. I will cover something else.

Q. Now as a result of this calling off the Calvert, did you perpetually thereafter lose that run? A. Yes.

Mr. O'Brien: I object to that question. It calls for a conclusion.

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The Court: Well, as a result of not having the Calvert, you had no other boat and you tried to get other boats.

The Witness: Yes, your Honor.

The Court: All right.

Q. And you have never since had that run. A. No.

Q. Now I think there were some items of the chattels I may have omitted. You testified to the mattresses and bedding and their value? A. No, I did not.

Q. Well, what was the value of that, and had you agreed on it? A. We had agreed on the crew bedding and mattresses; it was agreed, I think, at approximately $150—blankets, sheets and mattresses.

The Witness: May I get my notes, your Honor? They are in my briefcase.

The Court: Yes.

Mr. Dunham: This is not within the issues, not in the answers to the interrogatories. It is entirely new matter, your Honor, they are bringing up now.

Mr. Wittner: That was shown in the libel itself.

Mr. O'Brien: Is that in the schedule, Mr. Wittner?

Mr. Wittner: Yes, it is in the schedule. It is attached to the libel.

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The Court: Mattresses and bedding for seven or eight of crew.

Mr. O'Brien: May I look at it?

Mr. Wittner: Yes.

The Court: I just read it to you from the libel. What is the sense of looking at it?

Mr. O'Brien: I didn't have it, your Honor.

The Court: I read it to you and I am going to ask that you at least accept my word.

Mr. O'Brien: I certainly do, your Honor.

Q. Now did you testify to the various miscellaneous equipment and facilities? I think you mentioned them but I don't recall whether you mentioned the amount. A. Yes, I did, Five Hundred dollars for miscellaneous deck equipment.

Q. No, I am talking about the ladies' room, hospital dispensers, machines and so forth. A. That was mentioned, I am sure. Two hundred and fifty dollars.

The Court: Yes, $200.

The Witness: Or $200, yes.

Q. Now what was the total wages you paid the crew? A. Three hundred and fifty dollars.

Mr. Wittner: I believe that covers that.

Mr. Dunham: Are you through?

Mr. Wittner: No, I am not.

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The Court: Three hundred and fifty, you say?

The Witness: That was crew wages, your Honor.

The Court: Yes.

Q. Now you bid on these chattels to the Trustee in bankruptcy after the boat went into bankruptcy, or the com-

pany did. What was the occasion of your putting in a bid since you claimed you had the right to those chattels?

Mr. Dunham: It is improper redirect. We have been all over that, your Honor.

Mr. Wittner: I didn't cover that at all.

The Court: Maybe you should have.

Mr. Wittner: Yes, I said that I had forgotten to mention some things.

The Court: I am trying to get at the truth of this matter and I want to find out about it.

A. Well, the occasion for me putting in a bid for the Trustee's title at that time was because Mr. Fuchs had put in a bid for these items.

Mr. Dunham: Now I object, your Honor. There is no proof that Mr. Fuchs put in a bid; it was a man by the name of John A. Mendler and they have already covered that.

The Court: Well, the reason you put in a bid was because you thought Fuchs had put in a bid for the items, is that it?

The Witness: I was sure of it, your Honor.

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That's really the reason I did.

The Court: Well, you thought he did.

Mr. Wittner: I can prove that, your Honor.

Q. Who is Mendler? A. Mendler is the general manager for Mr. Fuchs.

Q. And who appeared in the Referee's office with Mr. Mendler? A. Mr. Stefferson.

Q. And who is Mr. Stefferson?

Mr. Wittner: Will it be agreed and stipulated that Mr. Stefferson was associated with—

Mr. Dunham: It will not because it was not Mr. Stefferson—

The Court: All right, he put in a bid—

Mr. Dunham: Mr. Sardaro, who runs his own office, is the one who appeared—

The Court: —regardless of the reason.

Mr. Wittner: Let me see— Mr. Dunham, I can prove that but I just want to see if we can save a little time.

Mr. Dunham: Go ahead, prove it.

I am not going to stipulate that Stefferson was in that. It was Sardaro, and you know it.

Mr. Wittner: We'll find out what I know in a minute.

Mr. Dunham: Go ahead.

Mr. Wittner: Do you deny that Mr. Stefferson took care of this bid.

The Court: Wait a minute; wait a minute, now. Don't get into a squabble with counsel. You just

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conduct your case here with your witness.

Mr. Wittner: All right. I will prove that by documentary proof then.

Mr. Dunham: He argued the appeal against you in Philadelphia. You know that.

Mr. Wittner: Mr. Dunham, you are making statements that are not according to fact.

The Court: And counsel are arguing between themselves and they are wasting my time because I am not paying a bit of attention except to be irritated.

Mr. Wittner: I offer in evidence the bid that was put in for the chattels as they are listed in the libel, in the name of John A. Mendler. It is a photostat of the original.

The Court: Well, what I have been trying to find out is what relevancy it has.

Mr. Wittner: Well,—

The Court: He bid for these things. Now he bid for them because he thought Fuchs was bidding for them.

Mr. Wittner: Well, he actually did. I can prove that Fuchs—

The Court: Suppose he did? What difference does it make?

Mr. Dunham: Put it in evidence. Show it to the Judge. It says there not Stefferson but somebody else.

The Court: What difference does it make?

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Mr. Wittner: I will observe the Judge's direction.

The Court: No, I am asking you, I haven't ruled on it yet, what difference does it make? You tell me what difference it makes, if there is a difference.

Mr. Wittner: Oh, yes. Mr. Fuchs was hiding his bid behind his general manager and he denied it—

The Court: Suppose Fuchs himself came out and bid for it? What difference does it make, if this man owned the property?

Mr. Wittner: Well, I am only showing as to why he put in a bid. Mr. Fuchs held it and he thought he could deprive him of his chattels by putting in a bid to the Trustee and creating an issue.

The Court: He put in a bid for these chattels. That's all we are concerned with.

Q. And before the Referee did you take the position in affidavit form that you were entitled to those chattels but you put in our bid to avoid an issue? A. Yes, that was the reason I put in a bid.

Q. All right.

The Court: How much was the bid?
Mr. Wittner: Five hundred dollars.

Q. Is that the bid that was put in by Mr. Fuchs? A. That's right; that's right, sir.

Q. And was it after you received notice of that that

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you put in yours? A. That's right.

Q. Now after the—

The Court: When was this bid?
Mr. Wittner: In March of 1953.
The Court: 1953.
Mr. Wittner: That's right.

Q. Now up to that time had you received any word at all from Mr. Fuchs or any offer to return those chattels? A. No, sir.

Q. Or had you heard from him at all? A. Not at all, no, sir.

Q. Now, coming down to the date when you said he withdrew the boat, did Mr. Fuchs tell you what arrangements he had made to have the boat moved to Perth Amboy?

Mr. Dunham: I object. It is improper redirect. It has already been covered, all of this.

The Court: I don't know. I think probably you might have brought this out on your direct.

Mr. Wittner: I don't think I did because Mr. Gardner called it to my attention afterwards.

The Court: All right, go ahead.

Mr. O'Brien: I object to it on the further ground that I don't see the materiality of it.

The Court: Well, let's find out.

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A. When I arrived there on the last day that we were aboard the Calvert, Mr. Fuchs told me that he had talked to the tugboat people that morning and had already ordered the towboat to take the vessel out of the yard and move her to Perth Amboy.

Q. Now, what time of the day did you leave Bethlehem shipyard on that day?

Mr. O'Brien: What day is this?

Mr. Wittner: The 10th or the 11th.

A. It was very late in the afternoon. It was probably between 5 and 6 o'clock.

Q. Now did you come back the next morning? A. Yes, I checked by there.

Q. Was the Calvert still there? A. Yes, I think it—no, I think the Calvert was— the next morning?

Q. The next day. A. It was moved the next day, Mr. Wittner.

Q. All right. Now, — A. Or the same day or that night, I don't know which.

Q. The same day or—? A. Either that night or— in any event, it wasn't there.

Q. It wasn't there when you came. All right.

Mr. Dunham: Well, by way of concession we will concede that the boat was moved on the 11th by a tugboat.

The Witness: Yes.

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Mr. Dunham: That will save a lot of time, I hope.

Mr. Wittner: Well, except it was gone before he came.

The Court: All right, it was moved on the 11th after Mr. Fuchs told him he was going to move it.

Testimony of Charles E. Gardner, Redirect

Q. Now, Mr. Gardner, you said that you had agreed with Mr. Fuchs for him to put his engineer on. Did he ever put his engineer on the boat?

Mr. O'Brien: I object to that. It is repetitious. We have been all over that in the main case. It is improper redirect examination.

The Court: I don't see that it is important. The fact of the matter is that whether he put the engineer on or not, there was no certification secured from the Coast Guard.

Mr. Dunham: May I stipulate that no engineer was put on. That covers that.

Mr. Wittner: No, it does not; that Mr. Fuchs didn't put him on. Because what I plan to show your Honor is that this had been planned by Mr. Fuchs, to breach this before he got there, for the purpose of obtaining the run for himself. I hope to bring some proof on that.

The Court: Well, you will prove it by other means than that. That is too remote, too indirect.

Mr. Dunham: And I think that should be stricken from the record. It is the same as he told Judge Modarelli—

The Court: The comment made by counsel, the same as comment made by other counsel, has no

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place in the record; it shouldn't have been made.

Mr. Wittner: Well, I just wanted to—

The Court: All right, all right.

Q. How many vessels had you chartered in your years of experience? A. Well, I don't know the exact amount but probably in excess of twenty.

Q. Have you ever been required to furnished a performance bond? A. Never; never.

Mr. O'Brien: I object to that as entirely immaterial, what he did on other occasions.

The Court: We are concerned only with what he did here.

Mr. O'Brien: The issue here is as to the Calvert.

The Court: There is always a first time if it happens at all.

Q. Now, after Mr. Fuchs withdrew his boat as you testified, did we get an order from the Court for you to make an inspection of these chattles? A. Yes, Mr. Wittner.

Mr. O'Brien: I object to the form of the question. It is a conclusion that Fuchs withdrew the boat.

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Mr. Wittner: Well, I said, I think, as he testified.

The Court: Did you get an order from the Court to view the chattels, and when was it secured?

Mr. Wittner: In 1954 but I don't recall the date.

Mr. Dunham: Your Honor made the order.

The Court: I made the order. I remember that.

Mr. Dunham: Yes, his Honor made it.

Mr. Wittner: It was in 1954 but I don't recall the date.

The Court: All right, all right.

Q. Now did you go to see the chattels? A. Yes, I did.

Q. With whom? A. With Mr. Frank Wilson and Captain Fred Rowe.

Q. Is Captain Rowe still alive? A. No, Captain Rowe has since died.

Q. But Mr. Wilson is expected here. A. Yes, he is.

Q. Now tell the Court where you found the Calvert and how you got aboard. A. The Calvert was lying at Perth

Amboy and I got aboard the Calvert by going aboard the New Bedford and crossing on to the Calvert.

Q. Was that the only way it could be boarded? A. Unless you came by vessel or boat.

Q. All right.

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The Court: Or helicopter.

Q. Did you meet Mr. Fuchs there? A. Yes, I met Mr. Fuchs.

Q. Did you see any of the property on board the Calvert? A. I inspected everything that was on the Calvert on that date.

Q. And what did you find? A. I found that there were approximately 350 chairs aboard.

Q. Were they all yours? A. No, some of them were not the type that I originally had sold to Mr. Fuchs. The chairs were all generally in poor condition and many of them were broken and it was evident that they were subject to long usage and weather conditions.

Q. What about the life preservers? A. The life preservers? There were a total of approximately 405 life preservers. These were all practically ruined. They had been moldy and left out in the open, where they were leaking overheads, and they were beyond redemption except for a few that were on the main deck.

Q. Could you identify by their markings whether they originally came from you? A. Some of them had originally come from Sandy Hook; some were other life preservers.

Q. I am not interested in the others. How many were there left of those that you sold? A. There were probably about 200 of the 400, possibly more.

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Testimony of Charles E. Gardner, Redirect

Q. Was the gangplank there? A. Part of the gangplank was there.

Q. Tell us what part. A. The bottom part of the plank was there but the portable aluminum handrails were missing.

Q. Could that gangplank be assembled and disassembled? A. Yes, it could be. It was portable, portable handrails, standchions that went into the plank itself and they were aluminum handrails.

Q. And is it moved from place to place by disassembling it and moving it a boat and assembling it? A. Well, you can move it in its entirety.

The Court: It's a portable handrail, portable gangplank.

Q. I mean for the purpose of moving it— A. Yes, from one deck to another.

The Court: "Portable" in my dictionary means movable or carriable.

Mr. Wittner: I just wanted to show your Honor that it is taken apart, disassembled, in order to make it easier for moving it.

Q. Now did you find your fire extinguishers on board? A. No, I did not.

Q. Did you find any of the equipment that— A. There was a few of the materials left pertaining to the ladies' room, the settee and part of a chair, but the rest of the

material was missing and the paint was gone and the 8-inch line was missing. All the tools and bedding and blankets and sheets, those items were all not there, none of them were there.

The Court: And what were there, as I understand you now to say, there were about 350 chairs aboard in poor condition, life preservers about 405, all of them beyond redemption except a few on the main deck, and of these 200 had been sold by you, and there was only the bottom of the gangplank; and that's practically all that was there.

The Witness: That's right, your Honor.

The Court: Now these chairs: Were they all chairs that you had sold?

The Witness: No, they were mainly chairs that I had not sold.

The Court: How many chairs that you sold?

The Witness: I think I wrote it down here. There were approximately 20 chairs on the bottoms of these chair piles that we had delivered to the—

The Court: You say there were only 20?

The Witness: About 20, approximately. I could be mistaken in a few of them but there were approximately 20 chairs that were—the original type of chair that we delivered to the Calvert.

Q. Now, was Captain Jenks' furniture still aboard? A. No, it wasn't there at all; none of it was there.

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Q. Did you see any—was Captain Jenks' folding there on board? I will withdraw that. Did you talk with Mr. Fuchs about it? A. Yes, I did. I asked him about—

Q. Tell us the talk you had with Mr. Fuchs at that time. A. I asked about the materials and particularly about the paint and the 8-inch hawser and Mr. Fuchs stated that he threw the paint cans overboard and the hawser was lost. Relative to the life preservers he told me that they were probably stolen; and as regards the chairs he said that he

had occasion that he had to move those from season to season.

Q. Now you were also asked by counsel last night as to what the profits was that the Sandy Hook made in 1950. Have you got those figures?

The Witness: Your Honor, you asked me to make this for you. I have made a copy. (Handing to the Court).

A. I have made a profit and loss statement for the operating season of 1950 as requested—

Mr. Dunham: I object to all this.

The Witness: You asked for it, Mr. Dunham.

Mr. Dunham: It is not binding on either of these respondents.

The Court: You asked for it. Don't you want it now?

Mr. Dunham: I didn't ask for it.

Mr. Wittner: It was one of them. Either Mr. Dunham or Mr. O'Brien asked for it.

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Mr. Dunham: I didn't ask for it. Neither of us asked for it.

Mr. Wittner: Not only that; they wanted the income tax returns.

Mr. Dunham: We asked him if he would produce the income tax report. We didn't ask him for all this.

The Court: Wait a minute.

Mr. Dunham: Do you want to go over it again and again?

The Court: Wait a minute. Is it your recollection that either counsel asked for the operating expenses to indicate the profits—

Mr. Wittner: That's right.

The Court: —of the Sandy Hook for the season of 1950?

Mr. Wittner: That's my recollection, sir.

The Witness: That's mine, too, your Honor. That's why I made it up.

Mr. Dunham: I say I didn't say a thing about it, I wasn't interested in it, because Mr. O'Brien covered it.

Mr. O'Brien: I covered the question of the bar profits and pointed out the figures.

The Court: The bar profits I remember.

Mr. O'Brien: Yes. That's what I went into.

The Court: I do remember that there was a question of the charter price of the Calvert and the

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operating expenses. I have no independent recollection of any question as to the operating expenses of the Sandy Hook, aside from the bar.

Mr. Wittner: I think counsel wanted to know all expenses for the purpose of determining the profits. However, if they are not interested in that I will abide by whatever your Honor's suggestion may be as to whether to go into it or not.

Mr. Dunham: All I asked for was a copy of the income tax report, if he would produce it; and furthermore, I wouldn't ask for what he says it is because I would object very seriously to the competency of it, your Honor.

Mr. Wittner: Well, counsel objects to the proof rather than—

The Court: No, I think the only possible thing we might be interested in is the number of passengers she carried and we have had that.

Mr. Wittner: Yes, he testified to that.

Mr. Dunham: All of this proof is certainly too remote.

The Court: Aside from the question asked by counsel as to the returns from the bars.

Mr. Dunham: Mr. Wagner suggested and I asked for it, about the income tax. That's all I asked for. I didn't ask for this. I am not interested in their profits.

Mr. Wittner: Well, I supposed you were by asking for the income tax returns.

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The Court: Well, he may have had some hidden purpose.

Mr. Wittner: I will abide by whatever suggestion your Honor makes,—

The Court: All right.

Mr. Wittner: —whether to get the earnings or not.

The Court: No; I think we have had from him the thing that would be significant; but I would like to know, I think I asked you, about the operating expenses of the Calvert and the estimated return from the fare. I think you gave us that.

Mr. Wittner: Yes, sir.

The Witness: That's right, I did.

Mr. Wittner: He did, the first day.

The Court: Yes.

Mr. Dunham: They gave us everything, but I wish your Honor would ask him about the rent of the office and the office help and telephone, you have to have all those things, electricity, miscellaneous repairs.

The Witness: I covered it; a twenty-five dollar item.

Mr. Dunham: None of that was covered.

The Court: What was the overhead for office expenses?

The Witness: Well, for the Calvert we would have—

The Court: No, no.

The Witness: Oh, for the Sandy Hook?

The Court: Yes.

The Witness: That was for a year, your Honor.

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The Court: Yes.

The Witness: The office and accounting for one year for the Sandy Hook operation was $1596. That was telephone and rent for the office, and accounting fees

The Court: For the Calvert you would have had only the operating months.

The Witness: Yes, your Honor.

The Court: All right.

Mr. Wittner: I think that's all I have.

The Court: All right, step down.

Mr. Dunham: No, I would like—

The Court: I told you that you would not see-saw.

Mr. Dunham: I am sorry, your Honor, but he has gone into all new matter.

Mr. O'Brien: New matter, your Honor.

The Court: All right. What have you got to ask him now? What have you got to ask him now? Tell me first, before-hand, so I can rule whether I want to hear it.

Mr. O'Brien: Only on the—

The Court: Now I am not going to listen to two of you. This gentleman asked first. Now what do you want to talk about?

Testimony of Charles E. Gardner, Recross

Mr. Dunham: Well, your Honor, I understand that he had the Americana, that's the Meseck boat, on Saturday moonlight sails. Mr. Meseck told me that. I want to ask him if that isn't true.

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The Court: No, I won't permit it. He didn't bring it out. You had your chance.

What did you want?

Mr. O'Brien: I would like to ask some questions on the new matter that has been brought out on this redirect.

The Court: All right, on the new matter, provided it doesn't relate to the Americana.

Mr. O'Brien: It won't be very long.

The Court: Provided it doesn't relate to the Americana.

Recross-Examination by Mr. O'Brien:

Q. Mr. Gardner, could you fix the date that you say that you went down to see the Calvert in 1954, pursuant to the order? A. On December 7, 1954. Excuse me; I will get my papers.

Q. That's good enough.

The Court: All right, December 7, 1954.

Q. Now did you go alone or was there someone with you? A. No, I stated Mr. Wilson and Captain Rowe—

Q. Were you alone or did you bring someone with you?

The Court: He said Mr. Wilson was with him.

A. Mr. Wilson and Captain Rowe were with me.

Q. I guess you are right. I'm sorry. I made a note of that, too. Now was Mr. Fuchs present at the time? A. Yes, Mr. Fuchs was present.

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Q. Was Mr. Fuchs' son present at the time? A. I don't know Mr. Fuchs' son.

Q. Well, was there—

The Court: Was there anybody else with Mr. Fuchs?

The Witness: There were people on his two vessels there. I don't know who they were.

The Court: Was there anyone with him at the time you had this discussion?

The Witness: No, I don't believe so.

Q. Well, wasn't there someone with Mr. Fuchs when you went around as you claim to inspect the life preservers. A. There may have been. I don't recall anybody being with him. There were people on that vessel at the time.

Q. Did you inspect the life preservers? A. Yes, I inspected them.

Q. And in inspecting the life preservers did you pick them up and turn them over to see which were stenciled "Calvert"? A. Not each one individually. There was a pile there that were rotten.

Q. Did you do that to some? A. To some I did.

Q. Yes. Was Mr. Fuchs there when you did that? A. Yes, Mr. Fuchs was there.

Q. Was there anyone with Mr. Fuchs at the time? A. I don't think so. There may have been.

Q. All right. Now, when you went on the other inspection, was Mr. Fuchs alone or was there someone with him also all the time?

Mr. Wittner: Which other time?

A. There was one inspection.

Q. Whatever inspection you made on that day, inspecting all this other material you tell us about, the gangplank,

the fire extinguishers, the chairs? A. I think there was somebody on —

Q. And Captain Jenks' furniture? A. I think there was a member of his crew or a friend of his on the main deck of the Calvert at the time that I inspected it.

Q. Didn't they come around with you? All follow you around? A. We didn't go very far, Mr. O'Brien.

The Court: Wherever you went.

Q. Wherever you went. A. They were in the vicinity of us, yes; they were there near us.

Q. Wherever you went, was not Mr. Fuchs there with someone else?

The Court: Where was this stuff that you examined?

The Witness: They were partly on the main deck and partly on the second deck aft.

The Court: All right; did they come to the second deck aft with you?

The Witness: Yes, I think one person came up

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with Mr. Fuchs and three with me, or three with myself included.

The Court: You three and Mr. Fuchs and probably somebody with Mr. Fuchs?

The Witness: Yes, a member of his crew I assumed.

The Court: All right. You don't know who it was.

Mr. O'Brien: That's all.

Mr. Wittner: That's all. Shall I call the next witness?

The Court: No. We will recess until a quarter of two.

(Luncheon Recess)

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* * *

The Court: Now when do you say you first approached Fuchs?

The Witness: Well, the first serious—the first approach was probably between the 15th of June and the 24th.

The Court: All right.

The Witness: The exact date I don't know.

The Court: All right. There is thirteen days' difference.

The Witness: Yes.

Q. Was that a personal approach? A. Yes, I approached him personally, either by phone or I stopped over, I don't recall, but that was not serious until July 2d.

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Q. All right. A. But that was my first approach, I was asked.

The Court: Now, you see, there is this further element to be considered there. You were raising some question about whether the boat would be ready at the time the track opened, and the first serious move that he says he made was July 2d, which was long after the track opened.

The Witness: That's right, your Honor.

Mr. Wittner: Yes.

* * *

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Q. Up to July 2d had you endeavored to charter another vessel?

Mr. Dunham: I object to that.

The Court: We have been all over that.

Mr. Wittner: All right.

The Court: It is not rebuttal.

Q. Now what is the distance in miles between New York and Atlantic Highlands? A. New York to Atlantic Highlands is 19 miles.

The Court: Via Brooklyn.

The Witness: Well, your Honor, Brooklyn is on the way. Brooklyn is in the Narrows.

The Court: It is not quite on the way.

The Witness: Well, no, there is probably a differential of an eighth of a mile.

The Court: All right. How long do you tie up a boat for taking on passengers?

The Witness: Well, we normally would get there—

The Court: You generally strike an average.

The Witness: With the Sandy Hook we had more time there, but ten or fifteen minutes is enough to put our passengers on which would be waiting, and get off.

Q. And with a boat at 10½ knots an hour, could you make the commuter run and all the runs that you testified to? A. Yes, sir, I could.

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The Court: Do you run a boat at top speed?

The Witness: Well, a Diesel boat we would but not a steamboat, because steam fluctuates, whereas you get constant power with a Diesel.

The Court: All right.

Q. Mr. Fuchs said that he showed you the inspection certificate of 1942 and said that shows you that the Calvert

needs a crew of thirteen. Did he say that? A. No, he did not.

The Court: What was it?

The Witness: Pardon me, your Honor?

The Court: What was the discussion, if any?

The Witness: Well, he said that—I asked him how much the Calvert would be required this year and he said "I think eight or nine."

Q. Now you have looked at the Coast Guard inspection here that is in evidence; what is the number specified by the Coast Guard for that vessel in 1951? A. Nine.

Q. Now, Mr. Fuchs said he didn't tell the Coast Guard inspector for how many passengers he wanted the Calvert certificated. Is that a requirement, that you tell the Coast Guard inspector how many passengers you want it certificated for? A. Yes, that's a natural requirement, to tell

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them that, because they must measure the deck space available and they get the total deck area and they divide it 10 square foot for each person. In this case there were 133,000, I think, square feet available. That would be 1300 passengers, and crew; that includes crew.

Mr. Dunham: I think he meant 13,000.

You don't mean 133,000, do you?

The Witness: 13,000.

The Court: You said 133,000.

The Witness: I am sorry. Ten square foot per person, that's the allowance. I made it really big.

Q. Now, Mr. Fuchs said he did not need, the Calvert did not need, a swinging line or a hawser to bring the boat in because he had a cable.

The Court: No, no, no. He didn't say that. What he said was it was tired up to the dock by a wire arrangement.

Q. Well, what is the rope used for? A. The rope is used to secure the vessel to the dock but in winter storage they use cables because rope would rot out during the winter season. Cables are more secure for winter storage.

Q. How about bringing your boat in? A. Well, you use lines, you use lines at all times to secure the vessel to the dock.

Q. Can you use a cable to bring it in? A. No, I mean a man couldn't handle a cable in the ordinary course of business; not that way.

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Q. Now there were two types of chair described, the circus chairs and some others. Which were your chairs? A. Our chair was the circus type chair.

The Court: The circus type chair is the canvas folding chair?

The Witness: Your Honor, it's a maple chair that's got individual slats in the seat and it has got brass counter sunk screws. That's how it differs. It's different from the square chair, which has got a solid piece of veneer wood, usually, as a seat; whereas the circus type has got a little different shape—it's not quite square; it's rather curved towards the front.

The Court: Yes.

The Witness: And they use it—

The Court: It has slats instead of a solid seat.

The Witness: It has slats, maple slats, that are secured with brass screws.

The Court: All right.

Q. Mr. Fuchs testified that the types of chairs that he had bought were the same as yours, or the square chairs and the circus chairs. A. I don't know.

Q. I beg your pardon? A. I don't remember seeing Mr. Fuchs' chairs; to be frank, I don't know.

(789)

Q. All right. But the chairs that you saw on deck when you came for the inspection—you saw some of the other chairs. A. Oh, there was a great deal of the old chairs there.

Q. Is there any difference in value between those chairs and yours? A. Yes, there is a difference in value.

Mr. Dunham: I object to all this. We have had all this. What is this, redirect or rebuttal?

Mr. Wittner: Rebuttal.

A. (Continuing) There is a difference in value, yes. The circus type chair is more expensive; it is a better chair.

Q. Now you have bought and sold used material, life preservers and chairs? A. To a limited degree I did, yes.

Q. And the life preservers—the price that you testified to, is that the reasonable value of materials in that condition? A. In the condition that these were delivered, yes, it was reasonable value.

Q. Now Mr. Fuchs said that the life preservers looked like they were ten years old. Do you know when they were bought? A. Yes, I know when everyone of those life preservers was bought.

Q. And when were they bought? A. They were all bought, the entire amount of them with the exception of the

(790)

new ones that may have been added in '50 and '49, they were bought in 1946. Every one of them was brand new, be-

cause I was on the boat at the time they were bought. They had on it before Kapok preservers which the Army used during the Army's use of that vessel and those preservers were not allowed for civilian use and they were taken off and all new preservers were put on.

Q. Now when were the chairs bought? A. The chairs were bought in 1946, at the same time.

Q. Were any bought in 1950? A. Oh, yes; we had to add to it each year. In fact, there was 500 bought in 1950.

Q. Now, I forgot to ask you about Captain Jenks' furniture when you were on before. What were the items of Capitain Jenks' furniture that were moved? A. Two chairs and a glass-top table, desk type, drapes, rugs, blankets, mattresses—one mattress, rather—and blankets and bedding.

Q. Were you there when some of it was bought? A. I was there when it was bought, yes.

Q. Tell us what was bought and for how much? A. Well, the items came in the year 1950, part of them, the bulk of them, from another vessel called the Bo Jangles. He bought that from the owner of the Bo Jangles, and he paid him $150—I gave him the $150 for it at the time; he bought

(791)

his bed and his two chairs, some of the drapes, wastepaper baskets and—

Mr. Dunham: I object to this. This is improper rebuttal. He is telling about that this captain owned this property. I thought he was supposed to own it. I think it is incompetent.

The Court: Well, I have got about three minutes more to waste. Go ahead.

Q. There is an assignment on file in the District Court, the Southern District Court, of that from Captain Jenks? A. Yes.

Mr. Dunham: I object to all this written assignment. It is irrelevant.

Mr. Wittner: I will ask leave to produce a photostat of it, if you think it is material.

The Court: Go ahead, go ahead. Any further questions?

Q. Did Captain Jenks turn that over to you when he got off the Calvert?

The Court: Is this rebuttal?

Mr. Wittner: No, sir. I forgot to ask him that. It is not rebuttal.

The Court: All right, don't do it then.

Mr. Wittner: All right. I think that's all. Thank you.

The Court: Is that all? Any examination?

Mr. Dunham: Just one question.

The Court: The part that is not rebuttal will be stricken out.

Mr. Dunham: No more questions.

The Court: This ends it so far, gentlemen?

Mr. Dunham: Yes, sir.

* * *

(742)

JOSEPH J. SCHRATWIESER, called and sworn on behalf of the respondents, testified as follows:

Direct examination by Mr. Dunham:

Q. Now may I ask, are you with the Seaboard Surety Company? A. Yes, I am.

Q. 79 John Street, New York? A. That's right.

Q. And is some of their business writing bonds? A. That's right.

Q. That name "surety" indicates a bonding business, does it not? A. We are primarily a corporate surety company.

Q. Yes. And is some of your business writing performance bonds? A. It is.

Q. And may I ask, what is your connection with the Seaboard Company. A. I am manager of the New York office of the Seaboard Surety Company.

Q. You are the manager. A. Yes, sir.

(743)

Q. You have been manager for how many years? A. I have been manager for about three years.

Q. And before that were you with the company? A. I was assistant manager for several years. I have been with the company about 15 years.

Q. And have you had experience in the applications for performance bonds and the issuance of performance bonds? A. Yes, I have.

Q. Can you state what the purpose of a performance bond is?

Mr. Wittner: That's objected to as immaterial.

The Court: What is your purpose?

Mr. Dunham: In showing this, your Honor?

The Court: Yes.

Mr. Dunham: Well, as an expert, to show your Honor, if it will be any help, the use, the prevalent use, of a performance bond in the marine world, and also the purpose of it.

The Court: Have you issued performance bonds for marine operations?

The Witness: Yes, sir.

The Court: All right, let's know what they are.

The Witness: Well, do you want names?

The Court: No, no.

The Witness: We have issued—

The Court: In marine operations what is a performance bond?

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The Witness: A performance bond can guarantee many of the various obligations concerned in the marine world. Among them are bare boat charter bonds to the Government—

The Court: Well, take a bare boat charter bond. What does the performance bond for a bare boat charter cover?

The Witness: It guarantees that the obligation will be fulfilled on the part of the charterer to the party owning the vessel.

The Court: The obligation contained in the charter?

The Witness: Yes, sir.

The Court: All right.

Mr. Dunham: I believe that's all.

Q. May I ask this: Who signs this bond? Does the surety company sign the bond? A. The surety company and the principal who is the obligor sign the bond.

* * *

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Supreme Court of the United States

October Term, 1957

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SOUND STEAMSHIP LINES, INC.,
Petitioner,

—against—

CHARLES GARDNER,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1957

No. .....

SOUND STEAMSHIP LINES, INC.,

Petitioner,

—against—

CHARLES GARDNER,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, SOUND STEAMSHIP LINES, INC., respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit.

Opinion of the Court Below

The opinion of the United States Court of Appeals for the Third Circuit (Appendix A) has not been reported.

Jurisdiction

The judgment of the Court of Appeals is dated and was entered on March 7, 1958. The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. Sec. 1254 (1).

The Statute Involved

Federal Statute (46 U. S. Code, Sec. 186) 4286 of the Revised Statutes of the United States.

Question Presented

Whether the Court below has correctly interpreted the generally and traditionally accepted Admiralty Law and the provisions of the Federal Statute, 46 U. S. Code, Sec. 186 (Sec. 4286 of the Revised Statutes of the United States) by a holding that oral conversations constitute a charter party rather than contract prerequisites which have consistently been followed by the Courts and Maritime Industry, particularly where an unjustified assumption of jurisdiction awarded damages of anticipated profits for a breach of an incomplete executory oral contract and wherein necessary mutual obligations are absent.

THIS HONORABLE COURT IS ASKED TO CONSIDER WHETHER SUCH RADICAL DEPARTURE IN EFFECT DESTROYS THE UNIFORMITY OF ADMIRALTY PRACTICE LONG ESTABLISHED, THAT CHARTER PARTIES SHALL BE CREATED BY A PRECISE UNDERSTANDING OF THE TERMS AND CONDITIONS UNDER WHICH A VESSEL SHOULD BECOME CHARTERED, INCLUDING THE MANNING, VICTUALLING, SUPPLYING AND NAVIGATING THEREOF.

Statement of Case

Meseck Steamboat Co. Inc., operated the S/S "Americana" from New York City to Atlantic Highlands for the Monmouth Park Jockey Club on a guaranteed sum of $1,300. per day from July 16, to and including August 8, 1951.

At page 230a of Sounds Appendix on appeal in the court below, respondent explains that Meseck would not charter the S/S "Americana" to him.

> "Q. And did you recommend the Meseck then to the track people? A. I did recommend the Meseck to the track people.
>
> Q. Meseck wanted to do it directly; he didn't want to charter it to you? A. He did it directly, he wouldn't charter it to me."

Prior to that time during the spring of 1951, respondent, ostensibly representing the Monmouth Park Race Track, Oceanport, N. J., came aboard Petitioner's boat the M/V "Calvert" which could carry about 1300 passengers, while she was undergoing repairs at the Bethlehem Shipyard at Staten Island, and engaged Petitioner's President and General Manager in talks about chartering the M/V "Calvert" for the purpose of transporting passengers from New York City to Atlantic Highlands enroute to the Monmouth Park Race Track for daily trips for a stipulated amount of $11,200. ($400. per day) (App. p. 81a).

Petitioner continued repairs anticipating that respondent, Gardner or his principal would pay the $11,200.00, sign a charter party with a satisfactory guarantor or have his principal sign it. The written hiring of Meseck's vessel was signed by a substantial pier concern or company which was apparently a subsidiary of the race track company.

(COPY)

(on Meseck Steamboat Co. Inc. stationery)

Atlantic Highlands Pier Co.
Red Bank, New Jersey

Dear Sirs:

This will confirm our agreement whereby you are chartering our steamer "AMERICANA" from the 16th day of July, 1951 to and including the 8th day of August, 1951, excluding Sundays and Monday, July 30, 1951, at the rate of One Thousand Three Hundred ($1,300.00) Dollars daily, payable each Monday commencing July 23, 1951 for the preceding week.

We will arrange and pay for the wharfage in New York and Brooklyn, fully man and equip the vessel. Steamer "AMERICANA" will sail from Pier 80, North River, New York City and from the foot of 69th Street, in Brooklyn, and deliver passengers at your Pier at Atlantic Highlands, N. J., Brooklyn and Pier 80, N. R., New York.

It is agreed that if by reason of fog, stress of weather, accident to steamer incapacitating same, strikes, or because the Master of said vessel may deem it dangerous or imprudent, the owners shall fail to fulfill this contract, then such failure shall not be considered a violation of contract, nor shall the owner be held liable for such failure; and that in any event, all damages for breach of charter contract on either side shall be limited to the amount of charter money above mentioned. It is also agreed between the Owner and the Charterer that if the passengers fail to board the steamer at the time of sailing specified, the Owner shall have at its option the right to proceed to the designated landing and return to the Piers mentioned above, and the Charterer shall thereby waive all claim for return of amount of charter money due.

It is also agreed and understood that the steamer "AMERICANA" may not be available on July 30. However, we agree to furnish another suitable vessel or vessels on that day.

It is further understood and agreed that we will arrange with our insurance underwriters to include coverage for your company in our public liability policies.

Very truly yours,

MESECK STEAMBOAT CO., INC.

By .....

ACCEPTED AND AGREED TO:

ATLANTIC HIGHLANDS PIER CO.
By .....

The best that can be gleaned from the contradictory and confusing testimony of both Gardner and Fuchs is that at the outset both negotiators insisted upon a written charter party. Gardner requested Fuchs to prepare such a written agreement. Fuchs agreed to draft a charter party and typed it out himself. At Gardner's request Fuchs handed the proposed charter party to Gardner. Gardner took it home with him to look it over. Gardner rejected the proposed charter party. At first, Fuchs, like Meseck, refused to do business with Gardner as a principal because he, Fuchs, had heard rumors about Gardner (App. pp. 71a to 84a).

Both the trial Judge and the Court below have ruled that whatever discussions took place on the deck of the Calvert and during the preparation of the charter party constituted an "arrangement."

As if it were a joint venture, Gardner and Fuchs worked out a plan whereby Gardner was to help Fuchs conduct the

Coast Guard drill for the purpose of obtaining a Coast Guard Certificate, by putting men aboard the vessel. Likewise, according to this plan, Gardner did loan to Fuchs chairs, life preservers and all types of equipment so that the vessel could pass the Coast Guard inspection. I'' preservers were necessary for the certificate but chairs were not necessary. Gardner had borrowed some of the gear and equipment, such as life preservers and chairs, from the S/S "Sandy Hook" whose owner was in bankruptcy, 77B, with Gardner serving as trustee for the bankrupt estate.

All went well until Gardner refused to pay the charter hire although Fuchs constantly insisted upon such payment. Gardner had no crew aboard, not even a skeleton crew. The men he loaned to Fuchs assisted Fuchs in his first attempt to have the Coast Guard conduct a Coast Guard drill. A davit broke during the drill and the Coast Guard suspended the operation. Delay was occasioned thereby.

During all this time Gardner was negotiating for another vessel. The Monmouth Race Track loaned Gardner $5,000.00 which he spent on another vessel which ended up in a ship repair yard without being put into service at the race track.

At the time of the attempted U. S. Coast Guard drill a few minor repairs were necessary. The Coast Guard did not issue a certificate. The Calvert was a dead vessel. Inasmuch as it was in the repair yard and could not leave on its own power-Mr. Fuchs hired a tug to tow it out of the yard. The next morning there was a bit of acrimony between the two negotiators and Mr. Fuchs ordered Mr. Gardner to take his men and gear off the vessel. Before night Mr. Fuchs withdrew the vessel from the negotiations which have been held to be an oral charter.

Gardner waited a year before taking any action. Then he had the vessel attached by a U. S. Marshal.

United States District Judge Modarelli ordered the vessel to be released as far as the second cause of action was concerned and ordered Sound to put up a bond as to the first cause of action. After Gardner's time had expired to appeal from the order of Judge Modarelli the trial Judge of this case directed that an order be made *nunc pro tunc* extending Gardner's time within which to appeal. On appeal to the Court below, that court ruled that the *nunc pro tunc* order was erroneous (Resp. App. p. 51a).

Another erroneous ruling by the trial Court was the allowance of interest on an unliquidated claim from July 12, 1951, as directed in Conclusion of Law No. 4.

Another erroneous ruling by the Trial Court on October 3, 1956, was the allowance of interest on an unliquidated claim from July 12, 1956.

Another erroneous ruling was when the Court allowed the interest from July 12, 1951.

Another erroneous ruling was on November 29, 1956, when the Court made an order allowing a reconsideration and clarification of the Court's rulings and denying application for dismissal of the libel as to Ernest E. Fuchs (App. pp. 14a to 28a).

Still another wholly erroneous finding was the trial Judge's judgment holding Fuchs answerable to Gardner on the theory that Fuchs, as representative of his principle violated the mythical oral charter.

Although the crux of the testimony at the trial, as far as respondents were concerned, evolved around payment of the charter money and giving of a performance bond, the trial Judge frankly admitted that he did not know what a

performance bond was. Therefore, the trial Court rejected the expert testimony of witness Schretweiser as to the purpose of a performance bond. (See excerpts from the Federal Government's charter party, App. C.)

The affirmance of the judgment by the Court below seems to be predicated upon a wholly erroneous statement in the opinion that "there is evidence that the respondent Sound had been paid at the rate of $2.00 per passenger for the round trip from New York City to Atlantic Highlands by the Monmouth Park Jockey Club, which issued a combination ticket including entrance to the race track and that in 1951 the rate would have been $2.50." This false premise coupled with the misinterpretation of Section 186, 46 U. S. C. emphasizes the injustice wrought by the affirmance which has so aggrieved the petitioner herein.

Reasons for Allowance of Writ

A. *Importance of Question Presented.*

A review by this Court as to the question presented is of great concern and importance to all shipowners of the United States, including those operating out of ports on the West Coast; shipowners with headquarters in the Gulf of Mexico; and shipping companies chartering vessels as owners from the many ports on the East Coast of the United States.

It must be said that the ruling sought to be reviewed represents such an unexplainable and drastic departure from the heretofore universally accepted statutory requirements for the chartering of a vessel that shipowners are apprehensive as to what dare be said while talking to a proposed charterer about hiring out its vessel for charter money.

The question is important because if a representative, of a racetrack, seeks to obtain a vessel for summer use for the racetrack and attempts to do the vessel owner a favor in completing the repairs and getting the vessel ready, by loaning a half a dozen men to the vice-president of the owner to conduct a coast guard drill, the Courts will construe such unrelated acts as supplying a crew for the vessel without the objection of the owner. Libelant testified that he had no crew aboard the M/V "Calvert," not even a skeleton crew, but that he loaned some men to Mr. Fuchs to conduct a Coast Guard drill. Apparently the machinations of getting a vessel ready for a Coast Guard Certificate were completely misunderstood by the Trial Court and Appellate Court below.

Of paramount importance to the Maritime Industry is the use of performance bonds which the Appellate Court completely misunderstood as is evidenced by the inference in the Opinion, that the use of an engineer of one's choosing rendered utterly useless all the customs and requirements with respect to the necessity of furnishing a performance bond in a written charter party.

Unrestrained liens against a vessel paralyzes the Maritime Industry as it is just as definite a diminution of her value as is physical damage.

By failure to provide for a performance bond and the payment of the charter fee, an owner is left absolutely helpless with no means of protecting himself.

Contrary to Admiralty custom and practice, the Court below has attempted to enforce an oral contract that makes no mention as to performance bond or to the payment of the charter money, but has awarded recovery by implying that these provisions are unnecessary, contrary to the decisions of *Jones & Laughlin Steel Corporation* v. *Vang*, 73 Fed. 2d 88, cert. den. 294 U. S. 735, where the Court said:

> "A diligent search has failed to uncover any law on a charter party by implication. All the law available to us deals with an express contract, whether written or oral, Benedict on Admiralty 4th Edition, Sec. 200. Being an express contract, it must be proved yet may be construed like any other contract. Declining to find a charter by implication, we are asked to construe the coal contract as a charter party."

The same rule was adopted in *The Severance*, 52 Fed. 916, 921, cert. den. 328 U. S. 983.

Petitioner seeks a forthright ruling by this Court to give some indication to the Maritime Industry as to what will be its holdings in the future with respect to the potential liability of shipowners in their attempts to prepare and negotiate charter parties. So destructive of the absolute reliance which has been placed on decisions and maritime customs during the years past that shipowners now have no criterion as to what talks and attendant acts, such as placing life preservers and gear aboard, and seamen, similar to a joint venture, will be construed as an oral charter party where the negotiators (Mr. Fuchs for petitioner and Mr. Gardner, for respondent for Monmouth Park Jockey Club) seek a written charter for their principals.

B. *Decisive Reasons for Allowance of Writ.*

1. The first reason for allowance of writ is that the decision in this case is so clearly erroneous that it should be reviewed by this Court as in the case of *McAllister* v. *United States*, 348 U. S. 19. The opinion states that the trial Judge's decision was not clearly erroneous.

2. Invoking admiralty jurisdiction by the trial Court and proceeding to judgment should be closely examined, where vessel was withdrawn from navigation.

3. The Appellate Court utterly failed to give adequate consideration to the crucial nature of an admiralty performance bond which under the custom of the maritime industry is given by the charterer of a vessel to the owner as part of the charter to protect the vessel herself from liens which otherwise might attach upon the vessel for unpaid seamen's wages, salvage and negligence in navigation while operated by the charterer away from the control of the owner and to protect the vessel from sale and satisfaction of such liens particularly where the trial Court held that the rejection by the charterer of a draft of the proposed charter party containing the customary bond requisite is not inconsistent with an oral contract of charter and upheld a libel by the charterer for breach of a charter party when the owner would not deliver the vessel.

4. Despite Gardner's admission that he had no charter; despite his testimony that he rejected a written agreement which he had originally insisted be made because it was made out to a corporation; and because the record is clear that the charterer did not have a crew to man the vessel, or even a skeleton crew, as required by the U. S. Coast Guard and Federal Statutes; and while the record is clear that respondent refused to read the proposed charter party, which he had insisted be prepared, the affirmance of the trial Court's invoking the jurisdiction of an Admiralty Court should be closely examined as being in conflict with the decision in *Dampskibsselkapet Danneborg* v. *Signal Oil & Gas Co.*, 310 U. S. 268, 279.

5. It is clear that Conclusion No. 2, that a parole charter existed by virtue of the arrangement agreed upon by the parties is based upon the implication that there were sufficient facts to constitute an arrangement which is diametrically opposed to the testimony of both Fuchs and Gardner.

Jones & McLaughlin Steel Corp. v. *Vang*, 73 Fed. 2d 88; *The Severance*, 92 Fed. 916, 921, cert. den. 328 U. S. 983.

6. Of the $50,885.00 awarded, $30,336.00 must be allocated to income from bar. Answer to interrogatories by libelant (Resp. App. p. 48a). This holding without any proof that respondent could or did get a liquor license from New York or New Jersey for the sale of intoxicating liquors, is alone sufficient reason for allowing a writ.

With Respect to the First Reason for Allowance of Writ—B-1.

Miscarriage of justice is indicated from the inception of the case—the *nunc pro tunc* order of the trial judge; the conduct of the trial judge during the trial; his holding Fuchs answerable to Gardner; the allowance of interest on an unliquidated claim, first from July 12, 1956 and then from July 12, 1951; holding that an "arrangement" constituted an oral charter without indicating upon which talks and conversations the Court's conclusion was predicated; and awarding damages on the basis of being deprived of profits on bar receipts when in fact there was no evidence that any authorities would issue a liquor license to Gardner.

As indicative of the trial judge's confusion and bewilderment, he handed down another decision as follows: The opinion filed herein on October 3, 1956 is amended as follows: "July 12, 1956"—line 3 on the top of page 7 should read: "July 12, 1951" (App. of Res. page 12a).

On December 5, 1956, the trial judge granted judgment which was apparently intended to correct his two former erroneous holdings. The judgment indicates that by December 5, 1956, the Trial Court decided that respondent should have interest from October 3, 1956 (App. of Res. Fuchs, page 13a).

With Respect to the Second Reason for Allowance of Writ—B-2.

At the trial the libellant completely divested an Admiralty court of its jurisdiction when he stated that he did not have a contract and that he did not have a charter party; that there was no completed Coast Guard drill; that there was no Coast Guard certificate issued; that there was no full complement of crews; that there was no full crew; that there was not even a skeleton crew; that there was no precise understanding, agreement or arrangement as to the supplying of the vessel by him; that he failed to conduct an inventory of consumable stores, such as oil and packing for the engines; that there was no precise understanding about him supplying any consumable stores or oil; that there were no talks about victualling the ship; that there was no manning of the vessel, except Captain Jenks and some four men placed aboard to help Fuchs when the Coast Guard men came aboard to conduct the first drill (App. 371a). Libelant proved by his own case and vigorously contended that the vessel was a "dead ship" within the meaning of *New Bedford Drydock* v. *Purdy*, 258 U. S. 96. *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187. Failure on the part of the negotiators to come to a meeting of the minds as to the time and place for the payment of the $11,200. charter money aborted the plans and divested the Admiralty court of jurisdiction.

Ward v. *Thompson*, 22 Howard (63 U. S.) 330, 333 (16 L. ed. 249);
Peoples Ferry Co. v. *Beers*, 20 Howard 393.

With Respect to the Third Reason for Allowance of Writ—B-3.

Perhaps it is gratuitous to attach excerpts from our government's "bareboat charter" to the application, but by

adopting this procedure an attempt is being made to present to the attention of the Court as forceably as possible the absolute necessity of a charter party which is not a unilateral contract but one binding on both parties thereto with respect to inventory, consumable stores, and fuel, maintenance, manning, insuring and bonding. By far the largest shipowner has been the United States. Its practice of requiring a written contract for the handling of a vessel by a charterer dissipates and/or neutralizes the harping of the textbook writers that oral charters are generally accepted. Neither the S/S "Americana" nor the M/V "Calvert" were harbor craft. They are vessels having a capacity of 1600 and 1300, respectively. The government, which insists on a written charter agreement, as did Fuchs and Gardner, at the inception of the discussions would never be content to have its contract considered a "memorial" of the talks, discussions or attempted arrangements as expressed by Corbin on Contracts, Section 30 (1950). Such treatise has been cited by the opinion of the court below.

With Respect to the Fourth Reason for Allowance of Writ—B-4.

All kinds of liens on a vessel may be acquired, including those of material men for supplies ordered from them by a charterer such as Gardner. In *Dampskibsselkapet Danneborg* v. *Signal Oil & Gas Co.*, 310 U. S. 268, 279, the court held that an owner must protect himself against such liens by his charter,

> "When the owner does not do so he should not be heard to complain when it appears that it is the charterers job to obtain supplies to keep the vessel on her way and the charterer has not prohibited reliance upon the credit of the vessel."

It is unconscionable for any court to enforce a so-called charter of this type where both Fuchs and Gardner insisted on a written charter party, while talks were going on on the deck of the vessel at the Bethlehem Ship Repair Yard, and finding out later when the negotiations were aborted due to circumstances, that they had accidentally made an oral charter.

With Respect to the Fifth Reason for Allowance of Writ--B-5.

If there were in fact a parole charter, the significance of it is that there must have been or should have been such an oral agreement that would be enforceable by both of the contractors. This proposition can best be urged by the inquiry as to whether there existed in the "arrangement" or the "parole agreement" any provision whatsoever by which Fuchs could have held Gardner. Looking in retrospect, if Gardner had obtained control of the M/V "Calvert," where is there one single iota of representations by Gardner with respect to the manning, victualling, and supplying the vessel, required by Section [illegible]196, and concerning which the trial court could hold Gardner responsible to Fuchs in the event of a violation. The discussions are fatally absent of any representations by Gardner upon which Fuchs could have sued him if he failed to properly navigate the vessel and take requisite precautions for the safety of 1300 patrons of the racetrack while they were aboard returning from the racetrack, having won or lost as their luck dictated. Therefore, one of the most important reasons for certiorari is to provide a vehicle by which the oral contract can be given the acid test to determine as to whether there was any provision at all enforceable by Sound as to Gardner.

FUCHS SAID HE WOULD NOT CHARTER TO GARDNER.

Q. All right. You also told him what?

The Court: You also told him what?

A. And I also told him that I would not charter the boat to him, he would have to give me the name of the party who would charter the boat, to which he replied that the race track would be interested, as that was where the boat was going to run, for the duration of the racing season of 1951.

Q. *Did you tell him you would not charter to him?* Is that right? A. That's right.

Q. And you knew of Mr. Gardner, did you not? A. I did (Resp. App. p. 70a).

Q. Now, was there any further conversation which you can tell his Honor about that took place at that time? A. Yes, he asked me if I would draw up a charter party, a bareboat charter party, showing the conditions under which I would charter the vessel to him.

Q. And what did you reply? A. I said I would go home that night and write it up myself.

Q. Did you? A. I did.

Q. How? A. On a typewriter, on stationery of the Sound Steamship Lines.

Q. Where? A. At my home.

The Court: A bareboat charter party?

The Witness: A bareboat charter party.

Q. Where did you do this typewriting? A. At my home in Bell Harbor (Resp. App. pp. 71a and 72a).

From pages 74a to 84a of Appendix is to be found evidence concerning the proposed charter which Fuchs objected to have signed by Gardner.

In re California Eastern Airways, Inc., 95 Fed. Supp. 348, it was held that a contract was never consummated by the claimant and debtor because neither claimant nor debtor consented to the terms of the agreement in the manner contemplated. This is a general rule enunciated by Williston on Contract, Sec. 28. Also whether an informal agreement which according to the understanding of the parties is to be reduced to writing takes effect as a completed contract at once or only when a formal written contract is executed depends upon the intention of the parties as construed from the facts in the particular case.

In *S. H. Kress Co.* v. *Fisher, et al.*, 65 Fed. 2d 82, the Fourth Circuit Court of Appeals ruled that where parties definitely agree that there should be no binding obligation until a formal lease had been signed and delivered the parties had not reached an agreement as to all initial terms of the contract.

In *Merchants American Marine Insurance Co.* v. *Letton* (2 Cir.), 9 Fed. 2d 799, 801, Cer. Den. 271 U. S. 668, the Court, in its opinion, said:

> "Reading the letters exchanged it is clear that the parties signify a willingness to enter into the contract, but neither considered the letters constitute such a contract. * * * ."

In *Julius Kayser & Co.* v. *Textron Inc.* (4th Cir.), 228 Fed. 2d 783, the Court said:

> "Whether or not the parties intend to be bound only by the execution of a formal instrument is a question of intent."

The Trial Court said:

> "I find that the parties did not intend to be bound until the agreement was reduced to writing and signed."

The question of a guarantor to Mr. Fuchs was very important.

In *Erlen* v. *The Brewer*, 8 Fed. Cases No. 4519 and in *Steamtug H. W. Edui*, 8 Benedict 238 the integrity of the charterer was questioned. No guarantee was furnished. There was no contract.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue as prayed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

CHARLES GARDNER,

—v.—

M/V CALVERT, Her Engines, Machinery, Tackle, Fittings, Equipment, etc., and ERNEST E. FUCHS and SOUND STEAMSHIP LINES, INC., and all Other Persons Lawfully Intervening for Their Interests.

No. 12,178, Appeal of CHARLES GARDNER.

No. 12,179, Appeal of ERNEST E. FUCHS and SOUND STEAMSHIP LINES, INC.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 10, 1957

Before:

BIGGS, *Chief Judge*, and
MARIS and McLAUGHLIN, *Circuit Judges*.

OPINION OF THE COURT

(Filed March 7, 1958)

By MARIS, *Circuit Judge*:

These cross-appeals arise out of an admiralty suit brought by the libelant, Charles Gardner, in the District

Court for the District of New Jersey against the Motor Vessel Calvert and her alleged owners, the respondents, Ernest E. Fuchs and the Sound Steamship Lines, Inc., following the alleged breach of an oral agreement to charter the Calvert. The libel asserted two causes of action. In the first, the libelant claimed the sum of $7900 for expenses incurred in hiring a crew and for the value of equipment furnished the Calvert and in the second, he claimed damages in the sum of $100,000 as a result of the respondents' breach of the charter party and withdrawal of the vessel. After a trial, the district court on October 3, 1956 filed findings of fact and conclusions of law as follows:

"Findings of Fact

"1. In July, 1951, respondent Sound Steamship Lines, Inc. was the owner of the Motor Vessel 'Calvert', and respondent Ernest E. Fuchs was president of said corporation.

"2. Beginning on July 2, 1951, libellant negotiated with respondent Fuchs with a view toward chartering the 'Calvert'. A parol charter resulted. Charter was for the purpose of transporting passengers from New York City to Atlantic Highlands en route to the Monmouth Park Race Track at Oceanport, New Jersey, for Sunday trips to Altantic Highlands, and for other stated purposes at the end of the racing season.

"3. Libellant also delivered equipment to complete the outfitting of the 'Calvert' to that ship on July 8, 1951, which respondent Fuchs took on board without protest, the evidence indicating to the court that the value of said equipment was $1,500.00.

"4. On July 8, 1951, libellant put a crew aboard the 'Calvert' without protest from respondent Fuchs.

"5. On July 10, 1951, libellant appeared with $5,000.00 as an advance ready to proceed, but respondent Fuchs failed, neglected and refused to go through with the charter agreement.

"6. Respondent Fuchs removed the vessel from its berth in New York to another in Perth Amboy, refusing to carry out the charter agreement.

"7. The equipment delivered by libellant has remained aboard the 'Calvert' and due demand for payment has been made.

"8. No attempt to pay for the equipment or to go through with the parol charter agreement has been made by respondent Fuchs, though duly demanded by libellant.

"Conclusions of Law

"1. This court has jurisdiction of the subject matter and the parties involved.

"2. A parol charter existed by virtue of the arrangement agreed upon by the parties.

"3. Respondent Fuchs accepted and agreed to pay for equipment furnished by libellant.

"4. Libellant is entitled to a decree against respondents for loss of profits from breach of charter, in the sum of $49,385.00, and for the equipment delivered by libellant aboard the 'Calvert', in the sum of $1,500.00, with interest from July 12, 1951[1] and costs of court.

"The damages have been determined in accordance with the principles set down in *Interchemical*

[1] The date "July 12, 1951" was inserted by amendment of October 5, 1956 in place of "July 12, 1956".

Corp. v. *Uncas Printing and Finishing Co.* (1956) 120 A. 2d 880, 39 N. J. Super. 318, which adopts the rule set forth in *Rynveld, et al.* v. *Depuis* (1930) 39 F. 2d 399, which latter case cites with approval a similar rule set forth in *Eastman Kodak Co.* v. *Southern Photo Material Co.* (1923) 295 F. 98, where the court said at p. 102:

> 'Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate. The defendant, whose wrongful act creates the difficulty, is not entitled to complain that the amount of the damages cannot be accurately fixed.'"

Motions were filed by the respondents for reconsideration, or for dismissal of the libel as to both respondents, or for dismissal of the libel as to the respondent Fuchs individually. These motions were denied by the district court which on December 6, 1956 entered a final judgment in favor of the libelant and against the respondents Fuchs and Sound Steamship Lines in the sum of $50,885 with interest at 4% per annum from October 3, 1956, the date on which the district court had filed its findings of fact and conclusions of law. These appeals by both parties followed.

On the respondents' appeal, Fuchs contends that the district court erred in refusing to dismiss the libel as to him individually and Sound Steamship Lines contends that the award of damages to the libelant is unsupported in the evidence. The libelant in his cross-appeal contends that the district court erred in awarding him interest at the reduced rate of 4% from October 3, 1956 only instead of at the rate of 6% from July 12, 1951, as directed in the court's amended conclusion of law No. 4. We will consider

these issues seriatim viewing, as we must, the evidence as to each issue in the light most favorable to the appellee involved.

The respondent Fuchs argues that in the light of the district court's finding of fact No. 1 that "In July, 1951, respondent Sound Steamship Lines, Inc. was the owner of the Motor Vessel 'Calvert', and respondent Ernest E. Fuchs was president of said corporation", the district court erred in refusing to dismiss the libel as to him. We think that he is right in this contention and that his motion to dismiss should have been granted. The libelant, however, argues that the respondent Fuchs should be held personally liable because he owned 100% of the stock. This, even if the premise were true, would not follow. It is a well settled rule that a corporation is for most purposes an entity distinct from its individual shareholders, *Klein* v. *Board of Supervisors*, 1930, 282 U. S. 19, 24; *New Colonial Co.* v. *Helvering*, 1934, 292 U. S. 435, 442, and only in exceptional instances may the separate corporate identity be disregarded. Furthermore it is normal for the president of a corporation to act as its chief executive officer and agent, and contracts made by a corporation's authorized agent within the scope of its legitimate purposes are binding on it. *Bank of Columbia* v. *Patterson*, 1813, 11 U. S. 299; *Chesapeake and Ohio Canal Co.* v. *Knapp*, 1835, 34 U. S. 541; Restatement, Agency, §§4, 320, 328. In the present case there was no evidence that the respondent Fuchs intended to be bound personally, or that he acted beyond the scope of his authority as president. Accordingly, he may not be held personally liable and the judgment must be reversed insofar as it holds him individually liable for the value of the equipment furnished the Calvert and for the damages flowing from the breach of contract.

The respondent Sound Steamship Lines' attack on the decree is threefold: Its first contention is that the district court erred in holding it liable in the sum of $1500 for equipment delivered to the Calvert. Little need be said in respect to this contention. Fuchs admitted in his testimony that equipment had been delivered aboard the Calvert and that it remained unpaid for. There is ample support in the record for the district court's conclusion that the respondent Sound Steamship Lines is liable for this equipment. The conclusion, accordingly, will not be disturbed.

The respondent Sound Steamship Lines' second contention is that the district court erred in finding that the parties had entered into an oral charter party. It argues that the negotiations between the parties were merely preliminary and tentative, that there was no meeting of the minds as to the terms of the contract and that they intended that the terms would finally be reduced to writing before becoming binding. The evidence discloses that on July 8, 1951, the day on which the libelant delivered equipment to the Calvert and put a crew aboard, Fuchs prepared and submitted to the libelant a form of charter party upon stationery of the respondent Sound Steamship Lines which the libelant rejected. This draft mentioned a performance bond, referred to a corporation instead of the libelant as charterer, and contained blank and unfilled spaces. Fuchs said he would redraw it to conform to their agreement. This he did not do. But the fact that the parties intended to put their agreement in writing is not necessarily inconsistent with the fact that they may have orally reached an agreement upon the terms of a contract. That parties may make a binding oral agreement is a well-settled principle in the law of admiralty. *Union Fish Co.* v. *Erickson*, 1919, 248 U. S. 308; *American Hawaiian S.S. Co.* v. *Willifuehr*, D. C. Md. 1921, 274 F. 214, aff. 280 F. 1023; *Tomkins*

Cove Stone Co. v. *Bleakley Transp. Co.*, 3 Cir., 1930, 40 F. 2d 249; *Salmons Dredging Corporation* v. *Herma*, 4 Cir. 1950, 180 F. 2d 233. The essential prerequisite to the formation of such a contract is the intention to do so, which the district court must determine from the actions of the parties and the surrounding circumstances. See the discussion by Judge Leahy in *Canister Co.* v. *National Can Corp.*, D. C. Del. 1945, 63 F. Supp. 361, 365-366, and Restatement, Contracts, §71.

As Judge Goodrich said, in speaking for this court in *Smith* v. *Onyx Oil and Chemical Company*, 1955, 218 F. 2d 104, 108:

> "Was there a contract? On this subject there are two rules which can be stated without the slightest disagreement by anyone. If the parties intend not to be bound until a written memorial is executed by each, then they are not bound until that event takes place. On the other hand, although parties may intend to put their agreement in writing, it does not follow that they have not made a contract until the writing is completed and signed. These two rules are set out in Williston on Contracts, §28 (Rev. ed., 1936), and in Corbin on Contracts, §30 (1950). The emphasis of these two eminent writers is, it seems to us, inclined toward finding the formation of a contract prior to the signing of the document unless the parties pretty clearly show that such signing is a condition precedent to legal obligation. And since contract law has passed the formalism of elaborate doctrines pertaining to sealed instruments, it seems to us such emphasis is quite natural and quite correct. . . .
>
> "As the text writers point out, the question here is one of intention of the contracting parties. Corbin is especially clear on this. He says:

'The courts are quite agreed upon general principles. The parties have power to contract as they please. They can bind themselves orally or by informal letters or telegrams if they like. On the other hand, they can maintain complete immunity from all obligation, even though they have expressed agreement orally or informally upon every detail of a complex transaction. The matter is merely one of expressed intention. If their expressions convince the court that they intended to be bound without a formal document, their contract is consummated, and the expected formal document will be nothing more than a memorial of that contract.' Corbin on Contracts, §30 (1950)."

In the present case the testimony was sharply conflicting. It is quite evident that the district court credited the libelant's witnesses and not those for the respondents. Since there is support in the evidence for the finding of the district court that an oral contract of charter was made, that finding may not be stamped as clearly erroneous and it must be affirmed. *McAllister* v. *United States*, 1954, 348 U. S. 19.

This brings us to the respondent Sound Steamship Lines' third and final contention, namely that the award of $49,385 for loss of profits is so conjectural and speculative as to be erroneous. It is settled that in establishing loss of future profits it is only the fact that some loss has resulted from the defendant's breach of contract which must be proved with certainty. Once that fact has been established the actual amount of the lost profits need not be proved with certainty but may be estimated from the facts in evidence, including the inferences to be drawn from them and the probabilities which they suggest. *Story Parchment Co.* v. *Paterson Co.*, 1931, 282 U. S. 555, 562-563; *Pal-*

mer v. *Connecticut Ry. Co.*, 1941, 311 U. S. 544, 561; *Bigelow* v. *RKO Radio Pictures*, 1946, 327 U. S. 251, 263-266; *Wakeman* v. *Wheeler & Wilson Manuf'g Co.*, 1886, 101 N. Y. 205, 209, 4 N. E. 264, 266; *Agitair Products Corp.* v. *F. C. Castelli Co.*, 3 Cir. 1952, 195 F. 2d 798. With these principles in mind we first consider whether the evidence which the libelant produced proved with reasonable certainty that he did actually suffer some loss of future profits as the result of the breach.

The libelant testified that prior to the time he negotiated for the charter of the Calvert he had been engaged in the maritime business for approximately 17 years, and that he had been connected with the Central Railroad Company of New Jersey for whom he had operated the S.S. Sandy Hook, which vessel he and others had acquired in 1947 and then had conveyed to the corporation, S.S. Sandy Hook, Inc., of which the libelant was president. Since the fall of 1949 the libelant operated the Sandy Hook as general manager for the debtor in possession under a court order issued pursuant to Chapter XI of the Bankruptcy Act. For several years prior to November 1950, when the Sandy Hook was seriously damaged, the vessel had been used from the middle of June until the end of the first week in August to transport passengers from New York City to Atlantic Highlands, New Jersey, en route to the race track operated by the Monmouth Park Jockey Club. In addition to this use, the vessel was operated to transport commuters from New York City to Atlantic Highlands during the racing season, for moonlight cruises, and for private charter parties, which libelant testified was the use he intended for the Calvert. It was certain in the middle of June, 1951, that the Sandy Hook would not be operable that season. On July 31, 1951 the corporation S.S. Sandy Hook, Inc., was adjudicated a bankrupt and a trustee was appointed. And it was between the middle of June

and early in July, 1951, that the libelant negotiated for the charter of the Calvert.

The Calvert had not been in commercial use for several years, and was, at that particular time, in drydock where a new diesel engine was being installed in her. For the uses for which the libelant intended the vessel the Calvert needed more life preservers, chairs, fire extinguishers and other equipment. Fuchs knew of its intended use for transporting the passengers bound for the race track. It appears that he himself offered to convey these passengers in the Calvert for the Monmouth Park Jockey Club at about the time of the breach. A representative of the Monmouth Park Jockey Club testified that during prior years the Sandy Hook had given the Club this service and that it intended the Calvert to be used for this purpose during the remainder of the 1951 racing season. In addition to this prospective use of the Calvert the libelant testified that there were charter parties originally arranged for the Sandy Hook for the 1951 season which had been designated for the Calvert.

The respondent Sound Steamship Lines urges that since the libelant was undertaking a new venture the possibility of profit from it was unascertainable. But we do not think that it can be said that the libelant was venturing on a new and untried business. While he was seeking to obtain another vessel it was to carry on the same business in which he had long been engaged. It was not a new venture in the sense used in the cases which the respondent cites. We conclude that there was ample evidence to support the conclusion that the libelant had suffered damage from the respondent's breach of the charter party.

We turn then to the contention that there was no basis in the evidence for determining the loss of profits upon which the district court could compute the libelant's actual damages. It has long been recognized that a party may

recover damages for the loss of anticipated profits when they result from a breach of contract. All damages resulting necessarily and directly from the breach are recoverable. *United States Trust Co.* v. *O'Brien*, 1894, 143 N. Y. 284, 287-289, 38 N. E. 266, 267. As we have seen, the rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. The trier of the facts may make a just and reasonable estimate of such damages based on relevant data and render its verdict accordingly. In such circumstances juries are allowed to act upon probable and inferential, as well as direct and positive proof. *Eastman Co.* v. *Southern Photo Co.*, 1927, 273 U. S. 359, 376-379; *Story Parchment Co.* v. *Paterson Co.*, 1931, 282 U. S. 555, 561-564; *Bigelow* v. *RKO Radio Pictures*, 1946, 327 U. S., 251, 264. In this regard it was said in *Palmer* v. *Connecticut Ry. Co.*, 1941, 311 U. S. 544, 560: "The ways compensatory damages may be proven are many. The injured party is not to be barred from a fair recovery by impossible requirements. The wrongdoer should not be mulcted, neither should he be permitted to escape under cover of a demand for nonexistent certainty." It is true, of course, that remote and speculative anticipated profits are not recoverable since there is no reasonable basis for their computation, and that an award of anticipated net profits may not rest solely upon a rough estimate.

To prove the amount of anticipated damages the libelant testified that the Sandy Hook made two round trips a day from New York to Atlantic Highlands, one trip for race track passengers and an intermediate trip for commuters, which trips he had proposed to continue with the Calvert; that the passenger capacity of the Sandy Hook was 1800, whereas the Calvert would have accommodated

1300 passengers; that a dining room and bar had been operated by a concessionaire on the Sandy Hook from whom the corporation received a designated share of the gross receipts; that he was to pay $400 a day for the charter of the Calvert and to provide $75,000 hull and machinery insurance, $250,000 protection and indemnity insurance, pay the crew and all the operating expenses, Fuchs to select an engineer whose wages were to be paid by the libelant. The charter was to begin as soon as Fuchs obtained the necessary Coast Guard certificate. There were charter parties which had originally been arranged for the Sandy Hook and which had been designated for the Calvert. There was some evidence to indicate that the income of the Sandy Hook for ticket sales for July and August, 1950, was $125,511.60; that about $16,000 was received from the dining room and bar concessionaire as 20% of the dining room receipts and 25% of the bar receipts; and that other amounts were received from charter parties. The libelant also testified as to the estimated daily cost of operating the Calvert. There was evidence that in past years an average of 800 passengers a day had been carried on the Sandy Hook during the racing season to Atlantic Highlands and that the vessel had been used for private charter parties during the summer season until Labor Day.

Martin J. Gross of the Meseck Steamboat Co., Inc., testified that Meseck operated from New York City to Atlantic Highlands for the Monmouth Park Jockey Club at a guaranteed sum of $1300 per day from Monday, July 16th to and including August 8th, 1951, using a larger vessel than the Calvert. The number of passengers transported during that period by Meseck is in the record. Gross also testified that one charter had been turned over to Meseck by the libelant for which it received $1500 and carried 969 passengers. Meseck was unable to take any

other charters, however, because it had a full schedule for the season. There was evidence that the respondent Sound Steamship Lines had been paid at the rate of $2 per passenger for the round trip from New York City to Atlantic Highlands by the Monmouth Park Jockey Club, which issued a combination ticket including entrance to the race track, and that in 1951 the rate would have been $2.50.

Upon the basis of this evidence the trial judge found the libelant's loss of profits to be $49,385. We cannot say that this finding is unreasonable or that it lacks sufficient basis in the evidence. True, it cannot be defended as mathematically demonstrable. But, as we have seen, mathematical certainty is not required in a case such as this. It is sufficient where, as here, the evidence discloses the elements of damage with indications of probable amount sufficient to provide the court or jury with the basis for a reasonable estimate of the whole loss. We accordingly conclude that the award of damages for loss of profits in the sum of $49,385 must be sustained.

One matter remains to be considered, the issue raised by the libelant on his appeal that he is entitled as a matter of right to the allowance of interest from July 12, 1951, as directed in conclusion of law No. 4 of the district court. He asserts that the court in allowing interest in its judgment only from October 3, 1956 violated the law of restitution in admiralty. For this proposition the libelant relies on *The President Madison*, 9 Cir. 1937, 91 F. 2d 835. However, that case does not support his position but is authority for the general rule, which has long been recognized, that interest may be allowed to make just compensation for losses in admiralty cases but that the award of interest depends upon the circumstances of each case and rests in the discretion of the court. *The Scotland*, 1886, 118 U. S. 507, 518-519; *The Albert Dumois*, 1900, 177 U. S. 240, 255; *The Manhattan*, 3 Cir. 1936, 85 F. 2d 427.

cert. den. 300 U. S. 654; *The Stjerneborg*, 9 Cir. 1939, 106 F. 2d 896, 898-899; *The Wright*, 2 Cir. 1940, 109 F. 2d 699, 702; *Carl Sawyer, Inc.* v. *Poor*, 5 Cir. 1950, 180 F. 2d 962, 963. See *3 Benedict on Admiralty*, 6th ed., §419; and *Annotations*, 96 A. L. R. 20; 111 A. L. R. 1300; 36 A. L. R. 2d 354, 359.

The libelant urges, however, that the principle above referred to applies only to collision cases and not to cases in which damages are awarded for breach of contract. We do not agree. Where damages are unliquidated and can only be established by litigation the application of the rule is a matter of discretion for the court dependent upon the circumstances of the case. *W. R. Grace & Co.* v. *Luckenback S.S. Co.*, D. C. E. D. Va., 1919, 258 F. 49, affirmed 4 Cir. 1920, 267 F. 676, cert. den. 254 U. S. 644. Although the district court originally indicated in its conclusion of law that it would allow interest from July 12, 1951, it had the power in the exercise of its discretion to recede from that allowance, reconsider the matter, and redetermine what was a just and equitable allowance under the circumstances. *O'Donnell Transp. Co.* v. *City of New York*, 2 Cir. 1954, 215 F. 2d 92, 94.

The libelant also contends that he is entitled as a matter of right to interest at the rate of 6% per annum, which is the legal rate of interest allowed in New Jersey, N. J. S. A. 31:1-1, and relies for this proposition upon admiralty cases in which the courts have found the application of the interest rate fixed by the state to be proper. While it may well be that 6% interest would have been a proper allowance, we cannot say that the district court erred in allowing interest at the lower rate of 4%. Section 1961, Title 28, U. S. C., provides that in a civil case interest shall be allowed on a judgment at the rate allowed by state law. However, Congress has not made the same provision in the

admiralty, in which the interest rate to be allowed on a judgment is a matter within the sound discretion of the district court. We do not find that there has been an abuse of discretion in this regard in the present case.

Accordingly, the judgment of the district court will be reversed as against the respondent Ernest E. Fuchs. As against the respondent Sound Steamship Lines, Inc., the judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,178 and 12,179

CHARLES GARDNER,

—v.—

M/V CALVERT, her engines, machinery, tackle, fittings, equipment, etc., and ERNEST E. FUCHS and SOUND STEAMSHIP LINES, INC., and all others persons lawfully intervening for their interests.

CHARLES GARDNER, Appellant in No. 12,178

ERNEST E. FUCHS and SOUND STEAMSHIP LINES, INC., Appellant in No. 12,179

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

BIGGS, *Chief Judge*, and
MARIS and MCLAUGHLIN, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed as against the respondent Ernest E. Fuchs and affirmed as against the respondent Sound Steamship Lines, Inc. Each party to bear its own costs.

By the Court,

MARIS
Circuit Judge

March 7, 1958

APPENDIX C

Excerpts from "Bareboat Charter" Agreement Used By United States for Chartering Government Owned Vessels Showing the Absolute Necessity of a Performance Bond—Clause 21

The provisions in such charters demanding hull and P & I insurance as well as the manning, victualing as well as acceptance and payment for consumable stores and fuel on board is indicative of the absolute necessity and requirement for a precise understanding and agreement as to all such items before consideration be given to the consumation of a charter agreement of any nature.

Form No. 303
SHIPSALESDEMISE

Contract No. MCc62600

(Military Sea Transportation Service)

BAREBOAT CHARTER AGREEMENT OF
WAR-BUILT DRY-CARGO VESSELS

THIS AGREEMENT, dated as of July 29, 1950, between the UNITED STATES OF AMERICA, acting by and through the DEPARTMENT OF COMMERCE (MARITIME ADMINISTRATION) (hereinafter called the "OWNER") and AMERICAN FOREIGN STEAMSHIP CORPORATION (hereinafter called the "CHARTERER"), whose address is 80 Broad Street, New York 4, New York.

WITNESSETH:

PART I

CLAUSE A. *Uniform Terms.* This Agreement consists of Part I and Part II. Unless otherwise in this Part I expressly provided, all of the provisions of said Part II shall

be a part of this Agreement as though fully set forth in this Part I. In the event of a conflict between the provisions of Parts I and II, the provisions of Part I shall govern to the extent of such conflict.

• • • • •

CLAUSE H.(2)(a) The working capital requirements prescribed in Paragraph (a)(2)(i) of said Section 299.31 shall be reduced so as to include prepaid insurance for a period of six months rather than for a period of one year.

CLAUSE H.(4) *Salvage.* Clause 19, Part II, entitled "Salvage" is hereby deleted in its entirety.

CLAUSE H.(5) *Gross Income.* Salvage earned by the Charterer shall be considered gross income as defined in Clause 23(a).

PART II

CLAUSE 1. *Condition of Vessels on Delivery.* The Vessels on their delivery shall be in Class A-1 American Bureau of Shipping or equivalent, with all required certificates, including but not limited to marine inspection certificates of the Coast Guard, Treasury Department, and so far as due diligence can make them, so, tight, staunch, strong and well and sufficiently tackled, appareled, furnished and equipped, and in every respect seaworthy and in good running condition and repair, with clean swept holds and in all respects fit for service.

CLAUSE 4. *Inventory.* A complete inventory of the Vessels' entire outfit, equipment, furniture, furnishings, appliances, spare and replacement parts and of all unbroached consumable stores, slop chest and fuel on board shall be jointly taken at the time of delivery and mutually agreed upon as to items, by representatives of the Charterer and

the Owner. Except as to broached and unbroached consumable stores, slop chest and bunker fuel, a similar joint inventory shall be taken and mutually agreed upon at redelivery. The Charterer shall take a complete inventory of all broached and unbroached consumable stores, slop chest and fuel on board at redelivery, and shall furnish the Owner with three certified copies of such inventory, priced at the current market price prevailing at the port and time of performance of Charterer's redelivery obligations, together with an affidavit certifying as to the correctness of such inventory. In event the Owner exercises its option to require redelivery at a Reserve Fleet site, the redelivery inventories above prescribed shall be taken at the port and time of performance of Charterer's redelivery obligations.

CLAUSE . *Consumable Stores and F*: The Charterer shall accept and pay for any unbroached consumable stores and fuel on board at the time of delivery at the market prices current at the port and time of delivery. The Owner shall have no obligation upon redelivery to accept or pay for consumable stores (either broached or unbroached), slop chest, or bunkers in excess of minimum amounts as established by the Owner. (Bunkers accepted by the Owner shall be paid for at the current market price prevailing at the port and time of redelivery, in event redelivery is effected at a port referred to in Clause G, Part I, or, in event of redelivery at a Reserve Fleet site, at the current market price at the port and time of redelivery repairs.) Prior to redelivery, such items shall be removed from the Vessels by the Charterer, and the fair and reasonable cost of such removal shall be charged in the Vessels' voyage accounts for the last voyage prior to redelivery. With respect to the aforesaid items, there shall be taken into account in the determination of additional charter hire, in accordance with Clause 23, Part II, (a) the current market

value thereof at the port and time of redelivery in event redelivery is effected at a port referred to in Clause G, Part I, or, in event redelivery is effected at a Reserve Fleet site, the current market value at the port and time of redelivery repairs, or (b) the net proceeds from the disposition thereof, in the event the Charterer elects to dispose of the removed goods and notifies the Owner of such intention prior to redelivery. The manner of, time and determination of net proceeds from such disposition of the items shall be subject to approval of the Owner.

CLAUSE 7. *Maintenance.* The Charterer, except as otherwise provided in Clauses 2(a) and 2(b), shall maintain the Vessels, their machinery, boilers, appurtenances, and spare parts during the period of the Vessels' use under this Agreement in good state of repair and efficient operating condition and in accordance with good commercial practices and shall keep the Vessels with full unexpired classification and other required certificates at all times, including, without limitation, unexpired marine inspection certificates of the Coast Guard, Treasury Department.

CLAUSE 10. *Charterer to man, etc.* During the period of this Agreement the Charterer shall, at its own expense, and by its own procurement, man, victual, navigate, operate, supply, fuel and, except as otherwise expressly provided in Clause 2(a) and 2(b) of this Agreement, repair the Vessels and pay all charges and expenses of every kind and nature whatsoever incident to the use and operation of the Vessels under this Agreement. The Owner reserves the right to require the removal of the Master or the Chief Engineer if it shall have reason to be dissatisfied with their conduct or if it considers their employment to be prejudicial to the interests of the United States. Except as otherwise expressly provided in this Clause and Clause 25 of this Agreement the Charterer and not the Owner shall

have exclusive possession, control and command of the Vessels during the entire period of use under this Agreement.

CLAUSE 16. *Insurance.* The Charterer shall at all times during the period of the Vessels' use under this Agreement carry and maintain on the Vessels insurance covering all marine and war risk hull and marine and war risk protection and indemnify insurances and such crew insurance as is required by applicable decisions of the Maritime War Emergency Board in such amount and in such form and with such insurance companies, underwriters or funds as the Owner may require and approve. All insurance required under the terms of this Agreement to be carried by the Charterer shall be placed and kept with responsible insurers satisfactory to the Owner, and shall include the United States of America as an assured, without right of subrogation against the United States in so far as its interest in said Vessels is concerned and without liability by the United States for assessments under any mutual form of policy. The hull and disbursement insurance on the Vessels shall be in an amount no less than the valuation set forth in Part I. The marine P & I insurance shall be in the amount of not less than $175 per gross ton, or the valuation figure set forth in Part I, whichever is higher, but not exceeding $2,000,000. The war risk P & I insurance shall be in an amount of not less than $60 per gross ton.

CLAUSE 21. *Bond.* The Charterer, at or before delivery of each vessel under this Agreement, shall furnish the Owner with a bond with sufficient surety, in the amount of $50,000 per Vessel, such bond to be approved by the Owner, both as to form and sufficiency of the sureties, and to be conditioned upon the true and faithful performance of all and singular the covenants and agreements of the Charterer

contained in this Agreement including, but not limited to, the Charterer's obligation to pay charter hire and damages and to indemnify against liens. The Charterer may, in lieu of furnishing such bond, pledge United States Government securities in the face value of the required amount under an agreement satisfactory in form and substance to the Owner.

IN WITNESS WHEREOF, the Charterer has executed this Agreement in quadruplicate the 25th day of OCTOBER, 1950, and the Owner has executed this Agreement in quadruplicate the day of , 1950.

Execution for Charterer

AMERICAN FOREIGN STEAMSHIP CORPORATION

By: F. RIKER CLARK
F. RIKER CLARK
PRESIDENT

Attest:

Morris Ginsberg
or if not incorporated

In the presence of:

.....
Witness

Execution for Owner:

UNITED STATES OF AMERICA
Department of Commerce
(Maritime Administration)

By: /s/ L. Marian

Approved as to Form:

/s/ Elvin E. Metz
Assistant General Counsel

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JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1957

No. 936

SOUND STEAMSHIP LINES, INC.,

Petitioner,

—against—

CHARLES GARDNER,

Respondent.

RESPONDENT'S BRIEF

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SOUND STEAMSHIP LINES, INC.,

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RESPONDENT'S BRIEF

Preliminary Statement

Petitioner applies for a Writ of Certiorari to review a judgment of the Court of Appeals for the Third Circuit which affirmed a judgment entered after trial before District Judge Thomas F. Meaney of the United States District Court for the District of New Jersey.

The action was in Admiralty and involves a libel filed by respondent which stated two causes of action (1) for the value of equipment delivered to the vessel "Calvert" owned by the petitioner, and (2) for a breach of an agreement to charter the vessel.

It was conceded that the equipment was delivered to the vessel with petitioner's knowledge and consent; that it was used and retained by petitioner and was still in petitioner's possession, or what was left of it, at the time of the trial some five years after delivery.

The charter party was entered into between respondent and Mr. Fuchs, an officer and the sole stockholder of the petitioner who acted on its behalf. Petitioner seems to question whether the agreement was consummated. This is not the position petitioner took at the trial. At the trial petitioner contended that an agreement had been consummated, but its officer, Fuchs, gave a different version of the agreement. His version was unsupported and was contradicted by eleven witnesses, by the documentary proof, and by his own previously sworn testimony. He was completely discredited and his testimony was rejected by the trial court.

The damages, too, were fully and completely established by competent proof. There is, therefore, only a question of fact involved. The evidence was fully discussed and analyzed both by the District Judge and by the Court of Appeals. Such questions of law as were involved are well settled, and are fully discussed in the opinion both of the Court of Appeals and the District Judge.

Opinion of the Courts Below

The opinion of the Court of Appeals is printed as Appendix A to petitioner's brief. The opinion of the District Judge, consisting of the Findings of Fact and Conclusions of Law, is not printed in the petitioner's appendix but is incorporated in the opinion of the Court of Appeals.

There is no basis for review; no substantial question for review is stated; no conflict with the decisions of other courts of appeal or with this Court is claimed; the case does not present any new or novel questions of law nor is it a departure from the accepted and usual course of judicial proceedings.

Petitioner attempts to create a question for review by stating that the interpretation of a statute (46 USC Sec.

186) is involved. The statute merely provides that the charterer is "the owner of such vessel," in cases where he is required to operate the vessel at his own expense. In such cases he becomes "the owner *pro hac vice*" (*Hastorf* v. *R. F. Long*, 239 F. 852). The purpose of the statute is to protect suppliers who extend credit to the charterer while the vessel is in his possession. It has nothing whatsoever to do with the rights and obligations between the charterer and the owner of the vessel. This statute is not involved in this litigation and its meaning is well known and well settled.

Petitioner further attempts to present a question for review by stating at page 2 that there was a "radical departure" from established Admiralty Practice. In making this statement petitioner assumes that the courts below held mere "incomplete" conversations to constitute a contract and presents the question whether "oral conversations constitute a charter party." That, of course, is too elementary a proposition to present to this court, or for that matter to any court. Such a holding, if made, would indeed be a "radical departure." However, respondent's proof—fully corroborated and substantiated in every detail—established a completed agreement and the District Court and the Court of Appeals so found.

Petitioner incorporates matter that is foreign to the issue; that was not before the courts below; and is not properly before this Court.

Petitioner at page 4 incorporates an agreement purporting to have been entered into between the Meseck Steamboat Co. Inc. and a company known as "Atlantic Highlands Pier Co." for the chartering of a vessel known as the "Americana." This agreement was not presented to the

courts below and is foreign to the cause herein. We do not even know who the Atlantic Highlands Pier Co. Inc., is.

We do know that after petitioner withdrew the "Calvert" from respondent, in breach of its agreement, the respondent tried to find another vessel that would take the place of the "Calvert," and approached, among others, the Meseck Steamboat Co., Inc. for the charter of the "Americana" but that Meseck made the agreement directly with the Monmouth Park Jockey Club, the owner of the race track. The terms of that agreement, however, have no bearing whatever upon the terms of the agreement between petitioner and respondent.

Petitioner also incorporates as Appendix C various excerpts from agreements used by the United States for chartering government owned vessels. That, of course, is also foreign to the issue and has nothing whatever to do with the case at bar.

Since only factual questions are presented by the record, it would hardly be necessary to review the evidence, especially since it was so fully considered and analyzed in the opinion of the Court of Appeals. However, it may not be amiss at this point to give a brief resume of the facts fully annotated with references to the record.

The Facts

Respondent-Libellant had been in active operation of excursion vessels for many years. Some four years preceding the contract in suit libellant was the President of Sandy Hook Inc. and the active operator of the "M/V Sandy Hook" which was engaged, in addition to running private charters, in a well-advertised run between New York and Atlantic Highlands, New Jersey, which is the terminus of

the race track operated by the Monmouth Park Jockey Club (237-238a; 410a).*

In the spring of 1951 the "Sandy Hook" was disabled as a result of a hurricane and libellant was looking for a boat to fill the vacuum. He found available the "M/V Calvert." It was owned by the respondent corporation of which Mr. Fuchs was the sole stockholder, officer, director, operator, and sole person in control.

Libellant met Fuchs on July 2, 1951 at the Bethlehem Shipyard in Staten Island where the "Calvert" was then berthed and negotiated for the chartering of the said vessel (210-214a; 219a).

Respondent explained that he was anxious to get started quickly because the race track season had opened and he wanted to cash-in on the track business; that he had the cooperation of the Monmouth Park Jockey Club who were also anxious to see that their patrons had an easy means of transportation to the track (210a).

Mr. Fuchs was then engaged in readying his vessel for excursion purposes and had made application to the Coast Guard for a certificate for 1300 passengers (Coast Guard Inspector's Book, Exh. 5, pp. 4-6). Fuchs was short some life preservers, chairs and other equipment which he needed to qualify for the Coast Guard certificate and asked libellant if he could supply them (211-215a).

On July 5, 1951 negotiations between Respondent and Fuchs were consummated in an oral agreement. Fuchs agreed to charter the vessel to Gardner up to and including Labor Day at $400 a day, with a down payment of $5,000. Gardner was to supply insurance, operate the vessel at his

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*The references, designated by a small (a), unless otherwise indicated, are to the petitioner's appendix submitted to the Court of Appeals. The references designated by SM refer to the stenographer's minutes.

own expense and supply his own crew, except for the Chief Engineer who was to be selected by Fuchs. Fuchs was to obtain the Coast Guard certificate (209-214a; 219-220a; 230a; 236a; 267a; 313-319a; 359a).

The charter was to become effective as soon as Fuchs obtained the Coast Guard certificate (213a; 267a; 313-319a) which was ready for issuance except for the delivery of the missing equipment and some minor items, including proof of Fuchs's ownership of the vessel which was required by the Coast Guard (Exh. 5, p. 70).

To expedite the inspection by the Coast Guard, Fuchs agreed to buy from libellant the equipment he needed for the Coast Guard certificate (216-217a; 223-231a; 307-309a). On July 8, libellant delivered the equipment to the Calvert and, at Fuchs's request, put his crew aboard except for the Chief Engineer, who, as stated, was to be selected by Fuchs (150-155a; 193a; 260-261a; 221-226a; 282a). The Coast Guard inspector arrived the next day, July 9th, but the inspection was not completed because of a minor accident in the course of the boat drill, namely, the bending of a davit which, however, was repaired the same day, and because of Fuchs's failure to supply some missing details. Fuchs also failed to produce for inspection by the Coast Guard the ship's papers or an abstract thereof which was required to prove his ownership (328-329a; Coast Guard Book, Exh. 5, pp. 69-70).

The inspection was to be completed the next day, July 10th but Fuchs failed to supply the missing details. He failed to submit the ship's papers. He failed to proceed with the inspection. He failed to get the Coast Guard certificate and he failed to select a Chief Engineer (121a, 204a, Exh. 5, p. 70). When Gardner arrived that afternoon, prepared to make the down payment and take over the vessel (230a; 352-353a; 109a), Fuchs informed him that he

was sick, that he did not want to go through with the deal and that he had already ordered the towing company to remove the vessel from the Bethlehem Shipyard to Perth Amboy where he would tie her up (228a, 417a). Respondent demanded performance of the contract and demanded payment for the equipment but Fuchs said "sue me." Respondent, Gardner, testified (228a):

"Q. All right. Tell us the talk you had with Fuchs on Tuesday or Wednesday. That would be the 10th or 11th, wouldn't it? A. That's right. After talking to the captain I asked Mr. Fuchs, I said 'When do you think you will have your certificate of inspection?' and he told me at that time that he was not going to go through with the deal, that he was sick, and that his wife had asked him to get away from the boats for the season, and that he was taking the boat out of the yard, that he was not going to run the boat that season at all. And I pointed out to him that he had made a deal with me and that we had this agreement in effect and that the boat was all ready except to get her final certificate, my crew was on there, the run was made to order; and he said 'I'm sorry, I'm not going to go through with this deal at all.'

"And of course we, both of us, may have got a little demonstrative. I admit I did. There was a lot at stake as far as I was concerned. And he told me in the final analysis to get the crew, myself, the hell off the boat that day. He said he's a very nervous man and he is moving his boat. And I asked him 'Do you want to pay for this equipment today? Do you want to pay for it now?'

"He says, 'No, I'm moving the boat, I'm moving the equipment. It will be down in Perth Amboy on the boat; and if you want to collect for it, you can sue me for it.'"

This was corroborated by Lohman (SM pp. 405-6) and by Captain Jenks (SM p. 367).

At the trial Fuchs denied that he was the guilty party to the breach. He insisted that he did not order the vessel to be moved until after his meeting with respondent on July 10th at which he claimed respondent refused to go ahead with the deal (201a). That Fuchs testified falsely and that he had planned the breach before his meeting with libellant, was conclusively established by the records of the Tice Towing Company, which showed that Fuchs had, in fact, ordered the vessel to be towed from the Bethlehem Shipyards to Perth Amboy before his meeting with respondent on the 10th. (Deposition of John H. Carroll, Vice-Pres. of Tice Towing Co. and Exhibit attached thereto.)

It also appeared that the reason Fuchs gave for his breach was not true. Instead of withdrawing by reason of illness, he contacted counsel for the race track and tried to make a deal "directly" with the track behind libellant's back and cash-in for himself on the expected profits (Mermelstein counsel for the track, SM p. 91). This was admitted by Fuchs himself who testified (193a):

> "I told him (Mermelstein) that the quickest way to get on the run was to sign a charter party for the racing association."

Far from being sick at the time of the breach, as he claimed, Fuchs was seen moving libellant's material from the "Calvert" to the New Bedford, another vessel owned by him, and which he currently used in his excursion business, promptly upon the arrival of the "Calvert" at Perth Amboy (Lohman, SM pp. 407-410).

In Fuchs's own admission in his examination before trial some of Gardner's equipment was still aboard the New

Bedford, two and a half years later, viz., December 2, 1953, the date of his deposition.

At the trial Fuchs tried to change this testimony. He said the equipment he referred to in his examination before trial was not the material he purchased from respondent but new material he purchased expressly for his other vessels (102, 736). The falsity of his claim appeared from his testimony on cross-examination (197a):

"Q. Now at the time of the examination you testified that the chairs were still on the New Bedford. A. They were, the new chairs that I took over from the Calvert.

The Court: Were any of the chairs that Gardner brought on the Calvert moved to the Bedford—

The Witness: Not that I know of.

Q. Then let me read to you some more from page 52:

'Question. Did you ever return that equipment that Gardner put on Board?

'He never came for it.

'Question: Did you return it, is the question?'

The Court: You have read that already.

Q. Page 58 then:

'Mr. Wittner: Can we send somebody aboard the New Bedford and the Calvert, to inspect the equipment today?

'The Witness: You can put somebody aboard to take it off.

'Mr. Dunham: Why the New Bedford?

'The Witness: The chairs are on the New Bedford.'

Q. Do you remember that testimony, Mr. Fuchs? A. Yes, I was referring to the new chairs.

The Court: Well, they couldn't take the new chairs off, could they?

The Witness: I didn't know what he was going to inspect, your Honor.

The Court: Well you said 'you can put somebody aboard to take it off.'

The Witness: That's right; aboard the Calvert.

The Court: No, you said—'Can we send somebody aboard the New Bedford and the Calvert, to inspect the equipment today?

'You can put somebody aboard to take it off.

'Why the New Bedford?

'The Chairs are on the New Bedford.'"

A later inspection of the Calvert in December 1954 showed that there was very little of respondent's equipment on board and what was there was so completely dilapidated as to be beyond redemption (Gardner, 420a; Wilson, SM p. 633).

As a result of the breach respondent lost, not only the business for that season but the race track made arrangements for the use of another vessel and respondent permanently lost the race track business and other business on the run which he had developed over the preceding few years.

Some of Petitioner's Grounds for Review Considered

Petitioner, for its version of the facts, adopts Fuchs's testimony and departs even from that testimony.* Since Fuchs's testimony was discredited and rejected by the trial

* Petitioner fails to refer to the record by page number as required by Rules 23 and 40 of the Rules of this Court.

court it cannot form a basis for review by this court. We will, however, refer to a few of the statements which petitioner conceives to be important reasons why a review should be granted.

1) Petitioner states that the case is important to the Maritime Industry because the decision is a departure from "statutory requirements for the chartering of a vessel."

As already pointed out there is no departure from statutory or decisional law or from customs or practice. This case involves purely a claim for damages for breach of contract. It does not involve and is of no interest to the Maritime Industry.

2) Petitioner states that both the District Court and the Court of Appeals "misunderstood" the importance of a performance bond and by failing specifically to mention the performance bond in the decision implied "that these provisions are unnecessary." This is both an assumption and a *non sequitur*.

The question of the performance bond was fully litigated at the trial and the proof showed that the parties agreed to do without a bond. At first, Fuchs did ask for a bond stating that he had installed a new Diesel engine and wanted to be protected against damage to it by an incompetent engineer. Respondent consulted with his insurance broker and was informed that the hull and machinery insurance covered the engine for all damages except for possible mishandling by the engineer. To relieve Fuchs of any concern on this point it was suggested that Fuchs be permitted to select his own engineer (289a-290a). Respondent submitted this suggestion to Fuchs who readily agreed to eliminate the bond and hire his own engineer although his salary would still be paid by respondent. Respondent testified (221a):

"And Mr. Fuchs says 'yes, that's an excellent idea. I would be glad to put my own engineer on the Calvert.'

"And I said 'By all means put him on and I will pay him his salary at the prevailing rate.'

"And that was agreed.

"I said 'Then it is understood that we have nothing further to do about performance bonds, Mr. Fuchs,' and he said 'That's all right. I'll put my engineer on. I'm satisfied.'"

Petitioner now intimates the trial court overlooked the question of the bond. The record shows that the court was keenly aware of the question and petitioner acknowledged it (291a):

"The Court: My recollection of the testimony is that Fuchs suggested a performance bond because of the fact that he had a new Diesel engine and that that evening you told Fuchs that you would get a hull and machinery policy and suggested that Fuchs put his own engineer on the Diesel to be paid by you, then there would be no question of a performance bond.

"The Witness: That's right, Your Honor.

"The Court: That's my recollection of the testimony.

"Mr. O'Brien (petitioner's trial counsel): That's his testimony, yes, as you just said.

"The Court: Yes."

Fuchs confirmed his agreement with Gardner to Mr. Mermelstein (counsel for the Monmouth Park Jockey Club) (Mermelstein, SM pp. 87-91). Conclusive proof that the agreement was completed and that Fuchs considered it complete is the fact that he asked respondent, Gardner, to put his crew and material on board (220-223a; 226a; 306a; 260-261a).

3) Petitioner states that respondent insisted on a written charter party and rejected it when it was presented. This, too, is contrary to the record. There was no agreement to put it in writing, although respondent, Gardner, "assumed" and "expected" it would be (283-284a). But Fuchs never submitted the charter in accordance with the terms agreed upon. He submitted "a form" of a charter on July 8th which he said he would rewrite to incorporate the terms agreed upon, but which he never did (252-253a). This case, therefore, comes squarely within the authorities, cited by the trial court and by the Court of Appeals.

4) Petitioner indulges in criticism of "the conduct of the trial judge." This is unfair and uncalled for. It is not substantiated by the record and no such complaint was made during the trial or to the Court of Appeals. This argument, made solely as an additional vehicle for review, is unworthy of discussion and may be dismissed without further comment.

5) Petitioner urges that there was no completed agreement because there was no commitment by respondent for which he could be held in the event of a violation of the agreement on his part. This, of course, is contrary to the record. It already appears from our resume of the facts that the agreement fully provided for all contingencies; for the acts to be performed by respondent and the consideration to be paid by him for the chartering of the vessel (213a; 218-220a; 229-230a; 267-268a; 313-319a; 263a; 359a). But this was also a matter for the trial court and the Court of Appeals.

It is unnecessary to go further. It completely appears from petitioner's own brief that there is no question involved in this case that merits the attention of this court.

CONCLUSION

The petition for a writ of certiorari should be denied, with interest and costs and damages for delay.

Respectfully submitted,

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of Counsel